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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ~~449~~

ROBERT M. BRAKE,

Petitioner,

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation and FRED SHERMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS THIRD DISTRICT, STATE OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS THIRD DISTRICT, STATE OF FLORIDA

The petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Florida entered in the above case on July 8th, 1968, and of the District Court of Appeal of Florida, Third District, entered March 19th, 1968, in the above case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida has not yet been reported. The opinion of the District Court of Appeal of Florida, Third District, is reported at 208 So.2d 107.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 19 of the Supreme Court Rules in that the Respondents specially set up, in their Motion to Dismiss Plaintiff's Complaint, their rights, privileges or immunities from suit for libel of a public figure under the First Amendment to the Constitution of the United States; and the question of the sufficiency of the allegations of actual malice in Plaintiff's Complaint was decided by the Courts below in a way probably not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED:

Petitioner was Plaintiff in the trial Court and filed a Complaint in three Counts against the Respondents who were Defendants below. Each Count alleged the publication of a separate libel. At the time of the publication of two of the libels Petitioner was a duly elected public official in Dade County, Florida. At the time of the publication of the third libel Plaintiff was an active participant in a public controversy and was admittedly a public figure as defined by this Court in **Curtis Publishing Company v. Butts**, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094. Although the Complaint as to all three Counts was originally filed before the decision in **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686, all three Counts separately alleged that

> "... Defendants acted maliciously, recklessly and in bad faith ..."

and alleged that Defendants knew the defamations were untrue when they were published. Each Count set forth additional facts to support this allegation.

Thereafter both parties moved for Summary Judgment as to liability and supported and opposed these Motions by evidentiary matter. After a hearing but before a ruling thereon was entered the pleadings were amended as to Count III. Defendants filed a new Motion to Dismiss all three counts. Thereupon the trial court entered a Final Judgment denying all Motions for Summary Judgment and granting Defendants' Motion to Dismiss Plaintiff's Complaint. Thereafter this Order was affirmed by the District Court of Appeal of Florida, Third District, "on authority of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686. See also **Curtis Publishing Company vs. Butts,** 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094." The Supreme Court of Florida refused certiorari on July 8th, 1968. The questions presented are:

1. Are the general allegations of malice in Plaintiff's Complaint sufficient to satisfy such pleading technicalities as may be required by this Court under the authority of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686.

2. Are the expanded allegations of malice in Plaintiff's Complaint sufficient to satisfy such pleading technicalities as may be required by this Court under the authority of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The pertinent portion of the Constitutional provisions and Rules involved are as follows:

1. The First Amendment to the United States Constitution.

2. Florida Rules of Civil Procedure Rule 1.110:

> "(a) Forms of Pleadings. Forms of action and technical forms for seeking relief and of pleas, pleadings or motions are abolished.
>
> (b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to pray for general relief . . .

> (f) Separate Statements. All averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances and a paragraph may be referred to by number in all subsequent pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense when a separation facilitates the clear presentation of the matters set forth . . ."

This is an adaptation of Federal Rule 8(a) and 54(c) of the Federal Rules of Civil Procedure.

STATEMENT

The Order of the trial court sought to be reviewed is a Judgment dismissing Plaintiff's Complaint without leave to amend. Defendants' Motion to Dismiss raised the constitutional question of the sufficiency of the Complaint to allege malice as required by the decisions of this Honorable Court interpreting the First Amendment to the United States Constitution. The trial court held that the allegations of the Complaint were insufficient to allege actual malice.

This cause was appealed to the District Court of Appeal of Florida, Third District, which affirmed the Judgment of the trial court on the authority of **New York Times Co. vs. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2 686 and **Curtis Publishing Company vs. Butts**, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094. As provided by Article

V, Section 4(2) of the Constitution of the State of Florida a Petition for Certiorari was filed with the Florida Supreme Court but that Court declined to take jurisdiction of the cause.

As amended, the Complaint alleged in three counts that three separate matters published in The Miami Herald newspaper by Defendant were false and defamatory as to Plaintiff and were made maliciously, recklessly, in bad faith, and for the purpose of causing Plaintiff to suffer embarassment, financial loss and other harm. Each count further alleges that the Defendants knew that the published statements were untrue at and before the times they were published.

1. Count I alleged that in August, 1962, Plaintiff was a newly elected member of the Dade County Commission and the Defendant The Miami Herald Publishing Company was a Florida corporation publishing a newspaper in Miami, Florida, having a daily and Sunday circulation in excess of 350,000; and that the Defendant Don Shoemaker was the editor of the newspaper with final responsibility for the anonymous editorials and editorial cartoons in the newspaper.

On Sunday August 26th, 1962 Defendants printed a front page editorial in the City Edition of The Miami Herald criticizing Plaintiff and four others for allegedly forcing the resignation of the County Manager. Plaintiff alleged the language was defamatory as stating and implying that Plaintiff was engaged in conduct which was unlawful or immoral or of doubtful legality or morality and that Plaintiff lacked maturity.

> In addition to alleging that the Defendants acted " . . . maliciously, recklessly and in bad faith and for the purpose of causing Plaintiff to suffer embarrassment and financial loss . . . " [A, p. 2]

the Complaint alleged that the Defendants knew the allegations of the editorial were untrue in that on the day preceding publication of the editorial the newspaper had run a story in which a Miami Herald reporter described a luncheon attended by the Reporter at which the resolution complained of in the editorial was discussed. This article showed clearly that Plaintiff did not participate in the drafting of the resolution and in fact attempted to persuade the author of the resolution to withdraw it. [A, p. 2] Plaintiff also alleged that he had requested a retraction under Chapter 770 Florida Statutes but no retraction was published.

2. Count II alleged that an editorial cartoon published on August 29th, 1962 depicted Plaintiff and others as small boys attempting to steal a pie from a window sill. The implication of said cartoon was alleged to be that Plaintiff was attempting to steal from the people of Dade County. The Complaint alleged

> "That Defendants acted maliciously, recklessly and in bad faith and for the sole purpose of causing Plaintiff to suffer embarassment and financial loss and to force Plaintiff to lose his position as County Commissioner; and to use Plaintiff's said loss as an example to other local political figures of the reprisal of which the Defendant would exact if any of them dared to act in opposition of Defendant's wishes." [A, p. 4]

The Complaint further alleged

> "That Defendants knew that the imputations of said cartoon were untrue as to Plaintiff and said knowledge was reflected in the news reports and news columns of Defendants' newspaper on the days immediately preceding the publishing of said cartoon." [A, p. 4]

Plaintiff also alleged that he requested a retraction as required by Florida Statutes Chapter 770 but that no retraction was published.

3. Count III alleged that after Plaintiff left public office a third editorial defamatory of Plaintiff was published by Defendants in the Miami Herald on Tuesday, August 25th, 1964. This editorial criticized Plaintiff as a lawyer-draftsman of two proposed amendments to the Metropolitan Dade County Charter and as one of the leaders of a group which sought to obtain an election on the amendments through the initiative process authorized by the Charter.

One of the Charter Amendments required certain reforms to be made in the office of the Tax Assessor of Dade County to correct the scandalous inequities in assessments which were brought to light as the result of the doubling of Dade County's tax roll following the decision of **McNayr vs. State ex rel DuPont Plaza Center, 166 So.2d 142.** The editorial stated

> "Bob Brake is a lawyer and he should know the law . . . The anti-Metro petitions now being circulated promise that the state law on the

assessment of real estate will not be enforced. "Could anything be more dishonest?" [A, p. 17-18]

The editorial also asked the rhetorical question

> "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?" [A, p. 17]

Plaintiff alleged that the first statement was false and that nothing in the Petitions or any statement made by or under the control of Plaintiff promised that state law would not be obeyed. Plaintiff alleged that the second statement implied that he had done nothing as a commissioner to obtain an equalized tax roll and that such implication was false. Plaintiff alleged certain steps he had taken as a commissioner to obtain an equalized tax roll which demonstrated the falsity of the libel.

To show malice as to the first statement Plaintiff alleged that Defendants had studied copies of the Charter Amendment and Plaintiff's statement before publishing the libel and that they knew the statements were false before they were published. [A, p. 13, 14]

As an alternative allegation of malice, Plaintiff alleged that the defamatory statements were made with a "reckless disregard of truth". To bolster this allegation Plaintiff alleged that Defendants

A. failed to contact him or any of his associates to determine the contents of the amendments.

B. did not read the amendments or press releases on which the editorial was based.

C. did not compare the report of a professional appraiser's group which had made recommendations for reforms of the tax assessor's office with the amendments, which would write those reforms into the charter, despite having published a prior news story stating that the report's recommendations were the source of the amendments. [A, p. 17]

To show malice as to the second statement Plaintiff alleged that Defendants had reporters at each session of the County Commission which Plaintiff had attended and were thus familiar with his efforts to obtain an equalized tax roll. [A, p. 13, 14]

Finally, Plaintiff added a general allegation as to malice which stated that

> "Defendants acted maliciously, recklessly and in bad faith and for the purpose of causing embarassment and humiliation to Plaintiff in his capacity as a lawyer and private citizen of Dade County . . . " [A, p. 14, 15]

The Complaint, less certain Exhibits not essential to the decision of this cause, are printed in the Appendix to this Petition. The Complaint and all Exhibits as well as the Motion to Dismiss and the Orders of the various courts are made a part of the Record filed with this Petition.

The Defendants filed Motions to Dismiss the Complaint which were heard and denied. Thereafter, Defendants filed an Answer and moved for Summary Judgment

and Plaintiff moved for Summary Judgment as to liability. These Motions were supported and opposed by evidentiary matter by both parties. After the hearing but prior to a ruling thereon only Count III of the pleadings was amended at the suggestion of the court. Defendants thereupon filed a second Motion to Dismiss the entire Complaint. [A, p. 19-20] After a further hearing the trial court entered an Order dismissing all three Counts of the Complaint and denying the various Motions for Summary Judgment. [A, p. 18-19] Florida's Third District Court of Appeal and Supreme Court affirmed The Judgment [A, p. 21-22]

REASONS FOR GRANTING THE WRIT

The decisions below should be reviewed because the State courts have decided the Federal question of the sufficiency of a Complaint to allege malice in a way probably not in accord with the applicable decisions of this Court. In addition, this question has not been decided by this Court since the rendition of the opinion in the case of **New York Times Co. vs. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 and the law thereon is not clear. In either event this Court should grant review.

Although none of the courts below gave any rationale for their decisions, the District Court of Appeal of Florida, Third District, cited the cases of **New York Times Co. vs. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 and **Curtis Publishing Co. vs. Butts**, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, as authority for its decision. [A, p. 22] These cases dealt with the legal standard of malice applicable to cases concerning a public officeholder or public figure and with the quantum of evidentiary proof

necessary to show such malice. They did not treat in any manner the question of the sufficiency of a Complaint for libel. However, their citation by the Court below makes it apparent that its decision was based on the question of malice.

First Question: Is a general allegation of malice sufficient?

Rule 1.110(b) Florida Rules of Civil Procedure, was taken almost word for word from Rule 8(a) of the Federal Rules of Civil Procedure. In addition Florida Rule 1.110(a) abolished technical forms for seeking relief. The function of a Complaint is held to be that of informing the Defendant and the Court of the nature of Plaintiff's claim in a manner sufficiently clear and direct to make it unnecessary for the Defendant or the Court to seek further allegations to determine the nature of the claim (**Parker vs. Panama City**, 1963, Fla. App., 151 So.2d 469).

Even before these Rules were adopted Florida Appellate Courts as well as this Court had occasion to pass upon allegations of malice in libel actions in connection with requests for punitive damages. In **White vs. Nichols**, 44 U.S. 266, 11 L.Ed. 591, the United States Supreme Court said

> "(a)ssuming the publication declared on as a libel to be one which would be prima facie privileged the circumstances which would render it illegal, in other words, the malice which prompted it, must be expressly averred. Upon this point the court will observe, in the first place, that in cases like the one supposed in

argument, they hold, that in describing the act complained of, the word 'maliciously' is not indispensable to characterize it; they think that the law is satisfied with words of equivalent power and import: Thus, for instance, the word 'falsely' has been held to be sufficiently expressive of a malicious intent, as will be seen in the authorities cited . . . But the declaration in each of these cases charges the defendants, in terms, with maliciously and wickedly intending to injure the plaintiff in his character, and thereby to effect his removal, from office, and the appointment of one of the defendants in his stead; and with that view, with having falsely, wickedly and maliciously composed and published and having caused to be composed and published a false, malicious and defamatory libel concerning the Plaintiff, both as a citizen and an officer. The averments in these declarations appear to the court, in point of fact, to be full up to the requirement insisted on, and to leave no room for the criticism attempted with respect to them."

In **Stewart vs. Codrington**, 1908, 54 Fla. 327, 45 So. 809, at 812, the Florida Supreme Court said:

"The declaration, in substance, avers that the Defendants, conspiring and maliciously intending to injure the Plaintiff in his profession and as judge, falsely, wickedly, and maliciously did publish and cause, and procure to be published, of and concerning the Plaintiff, to diverse good and worthy citizens of the State of Florida, in

> etc., the libelous matters contained in the several counts. These allegations, if true, we think deprives the alleged libelous matter of the character of privileged publications or qualifiedly privileged publications under the doctrine laid down in **Coogler vs. Rhodes**, 38 Fla. 240, 21 S. 109, 56 Am.St.Rep. 170, for it is there held what would otherwise be a qualifiedly privileged communcation is not so if the publisher is actuated by malice, and in this case there is the positive averment of malice. See **Abraham vs. Baldwin**, 52 Fla. 151, 42 So. 591, 10 L.R.A. (N.S.) 1051." (45 So. at 812)

The Court thus approved the simple words

"maliciously intending to injure the Plaintiff"

and

"falsely, wickedly and maliciously did publish"

as sufficient wording to sustain an allegation of malice to take the libel out of the qualified privilege category.

In the case of **Caldwell vs. Personal Finance Co.**, 46 So.2d 726, the Florida Supreme Court quoted the Complaint as setting forth that the libelous statement

> "... was false and was known by the Defendant to be false at the time said statement was made, and said Defendant made said statement maliciously and with the intent of preventing Plaintiff from procuring credit ... that the Defendant wilfully, wantonly, and maliciously slandered Plaintiff in his credit and reputation for the purpose of extorting from Plaintiff the payment of the sum of money ..." (46 So.2d at 727)

The Florida Supreme Court said of this pleading:

"If, as it is alleged, the appellee knew at the time of making its statement to Aetna Finance Company that said statement was false the communication should be held in law to be malicious unless appellee can establish its verity or make a clear showing that it had probable cause to believe it to be true. Since the declaration alleges that appellee knew that its statement to Aetna Finance Company was false it is unnecessary for the appellant to allege that the appellee did not have probable cause to believe the statement to be true . . .

"It is our conclusion that the amended declaration does state a cause of action and the demurrer thereto should have been overruled." (46 So.2d at 727)

In the case of **Hevey vs News Journal Corporation,** 128 So.2d 543, the Florida District Court of Appeal, Second District, had before it a Final Judgment which dismissed with prejudice a complaint in an action for libel. The Complaint alleged simply

". . . that Defendant maliciously caused to be printed and circulated . . ."

in their two newspapers an article and an editorial

". . . containing certain false, libelous, and defamatory statements of and concerning the Plaintiff . . ."

The Complaint further charged that the Defendant published the defamatory matter "with knowledge" that certain matters of fact were not true. The Court held that the Complaint stated a cause of action for libel against the several Defendants.

The language in the case at bar is much stronger than that found necessary by the courts in these cases. In each Count the Complaint alleged that the Defendants "acted maliciously, recklessly and in bad faith" and included in the first two Counts an additional allegation that it was done for the purpose of causing Plaintiff to suffer embarassment and financial loss and in the third Count was alleged to be for the purpose of causing embarassment and humiliation to Plaintiff in his capacity as a lawyer and private citizen of Dade County.

Since the decisions above, which approved the statements of the ultimate fact of malice made in the complaints in those cases as being sufficent to sustain a complaint against the demurrer, were rendered before the adoption of the present Federal or Florida Rules of Civil Procedure, then **a fortiori** the language in the case at bar should be sufficient to sustain the Complaint against the Motion to Dismiss under the present liberalized Rules of Civil Procedure. This is in line with general procedure throughout the United States. (33 Am.Jur., Libel and Slander, Sec. 242 pp. 221-222)

Neither the case of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed 2d 686, nor the case of **Curtis Publishing Company vs. Butts,** 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094, cited by the District Court in the case at bar, are in conflict with the four cases cited by

Appellant or controlling of the case at bar. Neither case involved the sufficiency of pleadings. Both cases involved appeals from jury verdicts in favor of the Plaintiffs.

In the **New York Times** case this Court stated clearly that the question before it was solely the

> ". . . rule of liability, as applied to an action brought by a public official against critics of his official conduct" (376 U.S. at 268, 84 S.Ct. at 719)

The Court held that the Constitutional guarantees of the First and Fourteenth Amendments to the Federal Constitution

> ". . . require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279 and 280, 376 U.S. at 726.

The language clearly shows it is directed at "proof" rather than pleadings.

In the **Curtis Publishing Company** case this Court defined the question before it as

> "... the impact of that decision (**New York Times Co. vs. Sullivan**) on libel actions instituted by persons who are not public officials, but who are

> 'public figures' and involved in issues in which the public has a justified and important interest."

While the **Butts** case extended the rule of the **New York Times** case to persons not public officials, this Court also stated clearly that

> ". . . neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication." (87 S.Ct. at 1990)

and both the judgment of the Court announced by Mr. Justice Harlan and joined in by Mr. Justices Clark, Stewart and Fortas and the concurring opinion of Mr. Chief Justice Warren found that there was ample evidence from which a jury could have concluded that there was a reckless disregard by the publisher of whether the article was false or not. Under the "notice" theory of pleading a simple allegation of malice should be sufficient even under these decisions.

Second Question: Are The Specific Allegations Of Malice Sufficient?

Even if a stricter standard were to be applied to require detailed allegations of fact in pleadings the decision of the court below is in error in the case at bar:

1. Defendants' knowledge prior to publication that the defamations were false.

The first test in the **New York Times** case is that actual malice consists in publishing a matter "with knowledge that it was false."

Falsity of the charges of Counts I and II as to Plaintiff was alleged to be known to Defendant Don Shoemaker and The Miami Herald prior to the time the editorial and cartoon were published. This general statement was amplified by a factual allegation that Defendants' courthouse reporter was present at a conference during which Plaintiff attempted to persuade Commissioner Long to withdraw his resolution and that fact was published in The Miami Herald prior to the day the editorial was published. Defendants therefore knew that Plaintiff was not part of any group seeking to fire the County Manager or to propose any substitute for the County Manager. [A, p. 2]

As to Count III there can be no doubt that the allegations of the Complaint set forth the fact that the defamation was a "calculated falsehood" of the type denied constitutional protection under the case of **Garrison vs. Louisiana**, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125. The allegations of Count III showed that the tax assessor amendment to the Dade County Charter, which was the subject of the editorial, embodied verbatim the recommendations of the Hunnicutt Report to the Dade County Commission and that this fact had been reported in The Miami Herald on August 7th, 1964. [A, p. 14] Furthermore, the Count alleges that the Defendants had been given copies of the amendment and Plaintiff's publicity releases and had in fact read these documents. [A, p. 13-14] The Complaint attached a copy of the amendment and a reading of it shows that there is no language in the Petitions which "promised that state law will not be obeyed". In other words, at the time that Defendants wrote and published the defamatory language

"Bob Brake is a lawyer and he should know the law . . . The anti-Metro Petitions now being circulated promise that the state law on assessment of real estate will not be enforced. Could anything be more dishonest?"

thus accusing Plaintiff of giving dishonest legal advice, they knew that the Petitions (which contained the amendment) did not promise that state law would not be obeyed and they knew that their accusation was false. These facts were clearly set forth in the Complaint and clearly meet the test of the New York Times and subsequent cases.

2. Defendants reckless disregard of whether the defamation was false or not.

The omissions of the Defendants, as detailed in Plaintiff's Complaint, almost parallel the omissions of the Saturday Evening Post in the Butts case. In that case the facts showed that Wally Butts, Coach of the University of Georgia football team, had been accused of giving notice of the plays to be used by his team in a forthcoming game with the University of Alabama to the coach of the Alabama team in advance of the game. The accuser claimed to have overheard a telephone conversation between the two coaches through an electronic mixup in telephone equipment.

Although both coaches denied the accusation, the Curtis people failed to take the following steps:

A. They did not interview either coach.

B. They did not view the notes of the accuser.

C. They did not interview witnesses known to have discussed the notes with the accuser on the day they were made.

D. They did not view the game films to determine if the alleged plays had actually been used even though the sports editor of the Post thought it was necessary. In fact, the notes were not of the correct plays actually used in the game.

E. The statements quoted in the article were denied by the persons quoted.

(The above facts were recited in 87 S.Ct. 1975 at 1993 and also in the lower court reports in 225 F.Sup. 917 at 918; 242 F.Sup. 390 at 394 and 351 F.2d 702 at 706).

The allegations in Count III of the Complaint in the case at bar are almost an exact parallel of these facts:

A. The Defendants had read the amendment and knew its content and that it did not promise "state law would not be obeyed". [A, p. 13-14]

B. Neither of the individual Defendants compared the Petitions to the Hunnicutt Report, even though a prior story in The Herald had reported it to be the source of the amendment [A, p. 14]

C. Neither of them read the press releases given out by Plaintiff and his associates although it was the contents of the releases which purportedly triggered the editorial. [A, p. 14]

D. Neither of them bothered to contact Plaintiff or any member of the committee circulating the Petitions to

determine the accuracy of the information which Defendants published. [A, p. 14]

E. Neither of them consulted Plaintiff or its own reporters for the public records or minutes of the Board of County Commissioners of Dade County, Florida to determine Plaintiff's voting record on tax assessment questions. [A, p. 14]

Since the defamation in question was an editorial printed some five (5) days after the newsworthy incident commented on it is obvious that the standards required of a responsible newspaper by the **New York Times Company** case and **Butts** case were not followed.

The case at bar is therefore in conflict with those cases.

So that the Court will not be under the misapprehension that the language is not libelous Petitioner respectfully shows as follows:

1. As to Counts I and II the case of **Hevey vs. News Journal Corporation**, Fla.App 148 So.2d 543, held that an editorial which by clear innuendo and inference stated that the Plaintiff was cheating the taxapyers by hiring incompetents for city jobs was libelous per se. The language complained of in the case at bar accused Plaintiff and four other County Commissioners of proposing to unload all manner of hacks and has-beens on Metro for managerial positions thus inferentially accusing Plaintiff of proposing to cheat the taxpayer by wasting government funds on unqualified employees so appointed.

2. As to Count III the **Hevey** case, supra, and the case of **Hoey et al vs. Fletcher et al**, 39 Fla. 325, 22 So.2d 16 and **Teare vs. Local Union Number 295**, 95 So.2d 79, hold that a publication is libelous per se if it impugned to another conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office. Plaintiff alleged that to publish of a lawyer that he is a lawyer and should know the law and that a public document prepared by him promises that state law will not be enforced, and then capping the entire libel with the rhetorical question "Could anything be more dishonest?" stated clearly and expressly and by implication that either the lawyer in question was stupid and did not know the law and was therefore incompetent as a lawyer or was dishonest in giving false legal advice. Publication of such a statement in a newspaper of more than one-third of a million in circulation, with no opportunity on the part of the hapless lawyer to rebut such a statement, can effectively destroy the lawyer's legal career.

CONCLUSION

In the case at bar the courts of Florida have thrown the law of libel and slander in Florida into confusion by a misinterpretation of the decisions of this court in New York Times Co. vs. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 and Curtis Publishing Company vs. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094. This confusion can cause great damage if allowed to continue. To clarify the law of pleadings in libel cases; to do justice in this case; and for the other reasons set forth hereinabove, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully Submitted

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APPENDIX

(CAPTION OMITTED)

COMPLAINT

COMES NOW the Plaintiff, ROBERT M. BRAKE, and sues the Defendants, DON SHOEMAKER, and THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, and shows unto this Honorable Court as follows:

COUNT I

1. That the Defendant, THE MIAMI HERALD PUBLISHING COMPANY, is a corporation duly organized and authorized to do business under the laws of the State of Florida and has its principal place of business in the City of Miami in Dade County, Florida, and that said Defendant is engaged in the publication of a daily and Sunday newspaper of general circulation, having a circulation in excess of 350,000 copies. The Defendant DON SHOEMAKER is the editor of said newspaper and has final responsibility for the anonymous editorials and editorial cartoons of said newspaper.

2. That from July 31, 1962, to and including February 19, 1964, Plaintiff was a duly elected member of the Board of County Commissioners of Dade County, Florida.

3. That on Sunday, August 26, 1962, Defendants printed an editorial on the front page of the City Edition of The Miami Herald which is defamatory of Plaintiff and injured the reputation of Plaintiff as an individual, an attorney, and as a member of a public body, by stating

and implying that Plaintiff was engaged in conduct which was unlawful or immoral or of doubtful legality or morality and that Plaintiff lacked maturity. Said imputations were particularly harmful to Plaintiff in his capacity as a member of the Bar of the State of Florida in that an attorney obtains clients on the basis of his honesty and integrity and the maturity of his judgment and to impute dishonesty, lack of integrity, or immaturity of judgment to Plaintiff injured Plaintiff in his occupation as a lawyer. A copy of said editorial is attached hereto and made a part hereof as Plaintiff's Exhibit "A".

4. That Defendant acted maliciously, recklessly and in bad faith and for the purpose of causing Plaintiff to suffer embarrassment and financial loss; to force Plaintiff to lose his position as County Commissioner; and to use Plaintiff's said loss as an example to other local political figures of the reprisals which defendants would exact if any of them dared to act in opposition to Defendants' wishes.

5. That Defendant knew that the allegations of said editorial were untrue as to Plaintiff in that on the preceding day, on Saturday, August 25, 1962, Defendant newspaper carried a story by one GEORGE LARDNER, then the Courthouse reporter for Defendant, in which said reporter described a luncheon, attended by said reporter, at which the Resolution complained of in the editorial was discussed and said article shows clearly that Plaintiff did not participate in the drafting of said Resolution and in fact attempted to persuade the author of said Resolution to withdraw it.

6. That Plaintiff had previously enjoyed a good reputation in said community as is evidenced by the editorial endorsement of Plaintiff's candidacy for office by Defendants on Thursday, May 3, 1962, and Tuesday, May 22, 1962. Copies of which are attached hereto as Plaintiff's Exhibit's "B" and "C".

7. That on August 27, 1962, Plaintiff wrote to Defendants demanding a retraction of said libellous statements under the provisions of Florida Statutes Chapter 770. A copy of said letter is attached hereto and made a part hereof as though set forth herein in full as Plaintiffs' Exhibit "D". In spite of said demand, Defendants failed, neglected and refused to print the retraction therein demanded.

8. As a result thereof, Plaintiff has suffered compensatory damages in excess of the jurisdictional amount of this Court and is also entitled to punitive damages.

WHEREFORE, Plaintiff demands judgment for compensatory damages in an amount in excess of the jurisdictional amount of this Court and demands punitive damages in an amount in excess of the jurisdictional amount of this Court, and Plaintiff demands trial by jury.

COUNT II

9. Plaintiff realleges each and every allegation of Paragraphs 1 and 2 of Count I hereinabove.

10. That on August 29, 1962, Defendants published a cartoon depicting Plaintiff and others as small boys attempting to steal a pie from a windowsill. A copy of

said cartoon is attached hereto and made a part hereof as though set forth herein in full as Plaintiff's Exhibit "E".

11. That said cartoon implies that Plaintiff attempted to steal from the people of Dade County, which is defamatory of Plaintiff and injured the reputation of Plaintiff as an individual, an attorney, and as a member of a public body, by implying that Plaintiff was engaged in conduct which was unlawful or immoral or of doubtful legality. Said imputations were particularly harmful to Plaintiff is his capacity as a member of the Bar of the State of Florida, in that an attorney obtains clients on the basis of his honesty and to impute dishonesty to Plaintiff injured Plaintiff in his occupation as a lawyer.

12. That Defendants acted maliciously, recklessly, and in bad faith and for the sole purpose of causing Plaintiff to suffer embarrassment and financial loss and to force Plaintiff to lose his position as County Commissioner; and to use Plaintiff's said loss as an example to other local political figures of the reprisals which Defendants would exact if any of them dared to act in opposition to Defendants' wishes.

13. That Defendants knew that the imputations of said cartoon were untrue as to Plaintiff and said knowledge was reflected in the news reports and columns of Defendants' newspaper on the days immediately preceding the publication of said cartoon.

14. That Plaintiff wrote to Defendants on September 17, 1962, requesting a retraction of the imputation of said cartoon. A copy of said letter is attached hereto and made a part hereof as though set forth herein in full

as Plaintiff's Exhibit "F". However, Defendant failed, neglected and refused to publish the retraction therein requested.

15. As a result thereof, Plaintiff has suffered compensatory damages in excess of the jurisdictional amount of this Court and is entitled to punitive damages.

WHEREFORE, Plaintiff demands judgment for compensatory damages in an amount in excess of the jurisdictional amount of this Court and demands punitive damages in excess of the jurisdictional amount of this Court, and Plaintiff demands trial by jury.

s/ ROBERT M. BRAKE

[Pictures omitted]

[Other exhibits omitted]

[Caption omitted]

FIRST AMENDMENT TO COUNT III OF COMPLAINT

COMES NOW the Plaintiff ROBERT M. BRAKE, and amends Count III of the above styled Complaint to read as follows:

COUNT III

16. Plaintiff realleges each and every allegation of Paragraphs One and Two of Count I hereinabove.

17. Beginning with the aforesaid editorial of August 26th, 1962 and continuing thereafter the Defendants DON

SHOEMAKER, and THE MIAMI HERALD PUBLISHING COMPANY and later the Defendant FRED SHERMAN, who was appointed to the editorial page staff of said newspaper after August 26th, 1962, acted maliciously, recklessly and in bad faith to bring Plaintiff into public disrepute, scorn and ridicule in both its news and editorials columns for the purpose of causing Plaintiff to suffer embarrassment and financial loss. For example:

(a) In the editorial published on August 29th, 1962, a copy of which was attached to Plaintiff's original Complaint in this cause, Defendants characterize Plaintiff and four other members of the then County Commission as "the romper boys". Through repitition of said term thereafter, Defendants characterized Plaintiff as a member of said group which was called "the romper boys" or simply, "the boys" and from time to time thereafter the Defendants would criticize the actions and voting records of some of the members of said group by characterizing said actions as the actions of "the boys". In this manner Plaintiff was criticized for actions which he did not do. A specific example of this is an editorial in said newspaper on June 6th, 1963, referring to actions of "the boys" at a Commission meeting which occurred while Plaintiff was out of Dade County on his annual short tour of military duty with the United States Air Force. Defendants' courthouse reporter, who was present at said meeting, knew that Plaintiff was not present at said meeting and was not responsible for the actions taken by the other four members of the group characterized as "the boys". A copy of said editorial is attached hereto as Plaintiff's Exhibit "G".

(b) Defendants also used the news columns of said newspaper to blacken Plaintiff's name. For example, Plaintiff reported an unusual offer of a campaign contribution to the vice chairman of the County Commission and to the State's Attorney's office. In reporting the investigation of the Dade County Grand Jury into this matter, Defendants used the news column of the MIAMI HERALD to imply that the Plaintiff was guilty of wrongdoing including the switching of headlines from the early edition of its newspaper on November 13th, 1966 which read "Metro Bribe Case" to a headline reading "Brake Bribe Case" in its later edition despite the fact that the Defendants knew that the Plaintiff was innocent of any wrongdoing.

(c) The actions of Defendants up to and through February 18th, 1964, caused the public to lose confidence in Plaintiff as a County Commissioner and contributed to the early termination of Plaintiff's term as County Commissioner on February 18th, 1964, instead of on June 7th, 1966 when Plaintiff's term would have ended ordinarily, thus causing Plaintiff to lose in excess of $16,000 in salary and allowances.

18. The malice of Defendants to Plaintiff continued after Plaintiff left the Dade County Commission and culminated in the publication of a defamatory editorial written by the Defendant FRED SHERMAN under the supervision of the Defendant DON SHOEMAKER and printed in THE MIAMI HERALD on Tuesday, August 25th, 1964, entitled "Darrey Davis and Mr. Brake". A copy of said editorial is attached hereto and made a part hereof as Plaintiff's Exhibit "H". The circumstances surrounding said editorial are as follows:

(a) During the month of July, 1964, Plaintiff was requested by Edward Sofen, a Professor of Government at the University of Miami, to draft two proposed amendments to the Metropolitan Dade County Charter. The first amendment was to require the Metropolitan Dade County Commission to implement the recommendations of the report of Hunnicut & Associates, a nationally recognized tax assessment consulting firm in St. Petersburg, Florida, concerning improved procedures for the Dade County Tax Assessor's office. The second amendment was to eliminate the office of County Manager and provide that the mayor of Dade County should be the chief executive officer of the county under a so-called "strong Mayor" form of government rather than a "manager-council" form of government. Plaintiff drafted said two amendments together with an initiative petition sheet to be used under the initiative provisions of the Metropolitan Dade County Charter and two instruction sheets for attachment to the Petitions for the use and benefit of persons soliciting signatures on the Petitions. The shorter of the two instruction sheets was used on the first set of Petitions printed and the longer sheet was used on all succeeding Petitions printed. No other instruction sheet or other information was given to those persons who solicited signatures on said Petitions. A copy of said Petition with the instruction sheets is attached hereto and made a part hereof as Plaintiff's Exhibit "I".

(b) Thereafter and prior to the County Commission meeting of August 4th, 1964, Plaintiff delivered a copy of said Petitions to County Attorney THOMAS BRITTON to pass upon the legal sufficiency thereof. At the meeting of the Dade County Commission on August 4th, 1964, said Petitions were formally presented to the

Commission by Plaintiff and Professor Sofen in the name of a group called "The Committee for Responsible Government" and were approved by the Commission as to form and legal sufficiency. Said Committee had thirty (30) days under the provisions of the Metro Charter within which to gather sufficient signatures on said Petitions to require an election on said proposed amendments.

(c) Beginning with the newspaper articles printed on the day said Petitions were approved, to-wit: August 4th, 1964 in the Miami News, and reports on the local radio and television stations, and continuing through the publication of said defamatory editorial, Plaintiff was consistently identified as one of the leaders, if not the primary leader, of the group sponsoring said Petitions. In the initial article reporting on the Petition movement, which was printed by the Miami Herald on August 5th, 1964, Plaintiff was identified as a leader of the group proposing the amendments in the following language:

> "A campaign to oust the present Metro Commission, abolish the County Manager's job, and set up a strong mayor form of government in Dade was launched Tuesday by a University of Miami professor and an ex-county commissioner.
>
> "Dr. Edward Sofen, the professor, and Attorney Robert Blake, a former commissioner said they will seek 43,000 voters' signatures required to force the Metro Commission to place two proposed charter amendments on the November 3rd ballot . . .

"The second amendment takes up the present tax reassessment issue as a standard to rally around . . ."

In addition, Plaintiff was identified in said article as the draftsman of the amendments in the following language:

"Brake, who is also counsel for the Dade League of Muncipalities, drafted the amendments and was listed as a supporter."

A copy of said article is attached hereto and made a part hereof as Plaintiff's Exhibit "J".

(d) Thereafter, all articles printed in the MIAMI HERALD concerning said Petitions identified Plaintiff as the leader of the group circulating said Petitions and characterized Plaintiff by adjectives intended to be derogatory. Copies of the articles appearing in THE MIAMI HERALD on August 7th, 1964, and August 18th, 1964, are attached hereto as Plaintiff's Exhibits "K", and "M" respectively.

(e) To further connect Plaintiff with the group circulating the Petitions THE MIAMI HERALD on August 6th, 1964, printed an editorial entitled "Mr. Brake and Others" in which Plaintiff was singled out as being "behind this latest effort to knock out Metropolitan Government in Dade County" and was characterized as a "rabble rouser". On the contrary, Professor Sofen was characterized as merely "lending his support" to the charter amendments when in fact, the amendments were conceived by Professor Edward Sofen and merely drafted by Plaintiff. Said editorial on August 6th, 1964, further ex-

poses Defendants' malice to Plaintiff and anticipates the libelous editorial hereinafter complained of by:

1. Pointing out the connection between Plaintiff as an attorney and state law governing tax assessments, and,

2. By the allegations of Defendants that "... it was the commissioners in 1961 who ran out on their responsibility to assess this county fairly".

and, after identifying Plaintiff as a former commissioner by failing to state that Plaintiff did not begin his term of office as a Metro Commissioner until July 31st, 1962 thus implying that Plaintiff was one of the Commissioners who acted improperly in 1961. A copy of said editorial is attached as Plaintiff's Exhibit "N".

(f) In order to explain the need for the two charter amendments to the public, said committee directed Charles Kimball, a local statistical analyst, to research Dade County's tax roll and compare assessments with actual sales of property. On August 20th, 1964, the Committee called a press conference at Plaintiff's law office and distributed to members of the press, including reporters for THE MIAMI HERALD, copies of a booklet containing such statistical analysis; a press release from Charles Kimball; and a second press release from Plaintiff. All of said documents were critical of the testimony of Dade County's appointed officials in the case of DuPont Plaza et al vs. McNayr, and emphasized the desirability of the Committee's Petitions which would call for the election of the County Manager thus making the manager

responsible to the people for any false testimony which he might give. A copy of said booklet is attached as Exhibit "O", Kimball's press release as Exhibit "P", and Plaintiff's press release as Exhibit "Q".

(g) Thereafter, on August 21st, 1964, the Defendant THE MIAMI HERALD published a newspaper article in which Plaintiff was further identified as a "backer of two Metro Charter Amendments" and the statements of Plaintiff, Charles Kimball, and various county officials were reported. A copy of said article is attached hereto as Plaintiff's Exhibit "R".

(h) Thereafter, on August 22nd, 1964, the Defendant THE MIAMI HERALD printed a second article reporting the reply of former county attorney, Darrey Davis, to the statements reported by the Defendant THE MIAMI HERALD in its aforesaid article of August 21st. In said article Plaintiff was further identified as "leading a campaign to place two proposed Metro Charter Amendments on the November 3rd ballot". A copy of said article is attached hereto as Plaintiff's Exhibit "S".

(i) Thereafter, on Tuesday, August 25th, 1964 the Defendants printed in THE MIAMI HERALD the defamatory editorial complained of which was written by the Defendant FRED SHERMAN under the supervision of the Defendant DON SHOEMAKER entitled "Darrey Davis and Mr. Brake". A copy of said editorial is attached hereto and made a part hereof as Plaintiff's Exhibit "H". Said editorial was libelous in the following regard:

A. Said editorial impugned Plaintiff's ability and integrity as a lawyer by stating that he "should know

the law" thus implying that although Plaintiff was a lawyer he did not know the law; and by stating that the "anti-Metro Petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?" thus implying that Plaintiff, as the lawyer draftsman of the Amendments and the leader of the group circulating the Petitions, was giving false legal information to the general public. Said statement was false, in that nothing in said Petitions, or any statement made by or under the control of Plaintiff, alleged that state law would not be obeyed.

B. Said editorial impugned Plaintiff's integrity as a public office holder by outlining the difficulty faced by Dade County in connection with its tax roll since 1961 and then stating: "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?" Said statements implied that Plaintiff did nothing as a County Commissioner to bring about a fair, equitable and lawful tax assessment roll, when in truth Plaintiff supported every effort to obtain a fair tax roll for Dade County during his eighteen (18) months as a County Commissioner, including, but not limited to the employment of Hunnicutt & Associates in November, 1963 to review the procedures of the Tax Assessor's office; and a protest of assessment procedures on July 22nd, and July 23rd, 1963, during the hearings of the Dade County Board of Equalization (which protests were never reported in Defendants' newspaper despite the fact that Defendants' reporters were present).

C. Said statements were made with malice by Defendants in that the Defendants FRED SHERMAN

and DON SHOEMAKER had received copies of said Petitions and had read the same prior to writing and printing said editorial.

D. As an alternative or additional ground of malice Plaintiff says that said statements were made with a reckless disregard of truth in that the authors of said defamation, to-wit, the Defendants DON SHOEMAKER and FRED SHERMAN, failed to contact Plaintiff or any of the principals of the Committee supporting said Petitions to determine the content and intended effect of said Petitions; did not read the original press release of August 20th, 1964, given to Defendant newspaper by Plaintiff; did not compare the Hunnicutt report with the Petitions despite the fact that in the newspaper story of August 7th, 1964, attached hereto as Plaintiff's Exhibit "K", THE MIAMI HERALD printed Plaintiff's statement that the tax assessment amendment embodied the recommendations of the Hunnicutt report; and did not consult Plaintiff or its own reporters or the public records of the minutes of the Board of County Commissioners of Dade County, Florida to determine Plaintiff's voting record on tax assessment questions.

E. On April 5th, 1967 the Defendant THE MIAMI HERALD printed a news article stating that the recommendations of the Hunnicutt report including but not limited to the preparation of the personal property manual had been implemented by Dade County which is presently using such a manual.

19. In publishing said defamatory matter Defendants acted maliciously, recklessly and in bad faith and for the purpose of causing embarrassment and humiliation

to Plaintiff in his capacity as a lawyer and private citizen of Dade County, Florida, and caused Plaintiff to suffer financial loss and mental suffering despite the fact that Plaintiff had previously enjoyed a good reputation in Dade County as is evidenced by the editorial endorsement of Plaintiff's candidacy for office by Defendants on Thursday, May 3rd, 1962 and Tuesday, May 22nd, 1962, copies of which are attached to Plaintiff's original complaint as Exhibits "B" and "C".

20. Thereafter, from time to time, Defendants continued their policy of maliciously, recklessly and in bad faith attempting to cause Plaintiff to suffer embarrassment and humiliation through the printing of irresponsible news and editorial articles concerning Plaintiff, including, but not limited to, conspiciously announcing that it had "no recommendation" in the elections for State Legislature, Group 18, in the General Elections of November, 1966, despite the fact that Plaintiff's only opponent was a Republican having no governmental experience or background whatsoever; and including but not limited to the actions of Defendants in inducing a candidate to run against Plaintiff in the reapportionment election of February 28th, 1967, on the promise of editorial support provided that the candidate qualified against Plaintiff.

21. On August 25th, 1964, Plaintiff wrote to Defendant demanding a retraction of the libelous statements of the editorial of August 21st, 1964, under the provisions of Florida Statutes Chapter 770. A copy of said letter is attached hereto and made a part hereof as though set forth herein in full as Plaintiff's Exhibit "T". In addition Plaintiff, together with two other members of the Committee, personally visited the Defendant FRED SHER-

MAN and pointed out to him the manner in which said editorial was erroneous and requested a retraction of the libelous statements. In spite of said demands, Defendants have failed, neglected and refused to print the retraction so demanded or the true facts of the matters alleged in said editorial.

22. As a result thereof Plaintiff has suffered financial loss, and mental pain and suffering in an amount in excess of the jurisdictional amount of this Court.

WHEREFORE Plaintiff demands judgment for compensatory damages and punitive damages in excess of the jurisdictional amount of this Court and Plaintiff demands trial by jury.

s/ ROBERT M. BRAKE
1830 Ponce de Leon Boulevard
Coral Gables, Florida

[Jurat and Certificate of Mailing Omitted]

Exhibit H:
Darrey Davis And Mister Brake

THE ONE MAN who always played it straight and honest with the people he was working for is now under attack by Robert Brake and his gang of Metro-wreckers.

Darrey Davis, who served Dade as its county attorney seven years and pulled it through countless political assaults, is now accused of mishandling the Dupont Plaza Hotel suit that led to the court-ordered doubling of the tax roll. It is a credit to the mild manner and even temper of Mr. Davis that he only called the Brake Gang "political

opportunists." He could have used sharper language with good cause.

Bob Brake is a lawyer and he should know the law. Instead of complaining that Darrey Davis didn't oppose the Dupont Plaza suit with enough "vigor," Mr. Brake should have acknowledged the facts.

When Bob Brake went on the Metro commission in 1962, the county was on notice to obey the Florida law on assessment. The court had been promised we would obey that law. But two more years were to go by while County Attorney Davis fought tax suits in the courts and pleaded with his own commissioners to achieve a tax roll that would satisfy the law. Over and over again he warned that he could not continue to hold off law suits filed by property owners who were carrying more than their fair share of the county tax load.

As Mr. Davis said this past weekend, "By reason of the 103 law suits attacking the county's tax rolls since 1961, it was apparent to everyone that someday the roll would be successfully challenged if it were not made to comply with the requirements of the Constitution and the statutes." If this were the first time Mr. Davis had said this, you would accuse him of most anything. But the county attorney said this back in 1961 and he kept repeating it. Where was Bob Brake and what was he doing as a Metro commissioner to make Dade County comply with the Florida assessment law?

The court-ordered assessment crisis has given hope to an irresponsible minority attempting to overturn the first stable commission government Dade has had since

Metro was created. It is a sign of that irresponsibility when the reputation of Darrey Davis is attacked.

We refuse to believe that Metro can be wrecked on the issue of fair taxation ordered under Florida law.

The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced.

Could anything be more dishonest?

[All other exhibits omitted]
[Caption Omitted]

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause came on to be heard, after notice to all parties, on Motion to Dismiss and Motion for Summary Judgment filed by the defendants herein and a Motion for Partial Summary Judgment filed by the plaintiff herein. The court heard argument of counsel. The court is of the opinion that the plaintiff was a public official at the time of the occurrence and publication of the matters referred to in Counts I and II of the Complaint and a public figure at the time of the occurrence and publication of the matters referred to in First Amendment to Count III of the Complaint. Upon consideration, it is,

ORDERED AND ADJUDGED:

1. That Motion for Summary Judgment filed by the defendants and Motion for Partial Summary Judgment filed by the plaintiff are hereby denied.

2. That Motion to Dismiss filed by the defendants is hereby granted and the Complaint, the First Amendment to Count III of Complaint and this cause are hereby dismissed.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 14th day of July, 1967.

HARVIE S. DuVal
Circuit Judge

[Docketed July 14th]
[Caption Omitted]

MOTION TO DISMISS

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a corporation, and FRED SHERMAN, defendants, move this Court for an Order dismissing the Complaint and First Amendment to Count III of Complaint for failure to state a cause of action in that:

1. It appears from the Complaint that this Court knows judicially that plaintiff was a public official or a public figure at the time of the publications complained of, and the Complaint and First Amendment to Count III of Complaint fail to allege that the defendants published the matters complained of with actual malice.

2. The Complaint and First Amendment to Count III of Complaint fail to allege or, alternatively, it does not appear from the publications themselves that the matters complained of or any of them referred to the plaintiff.

3. It affirmatively appears from First Amendment to Count III of Complaint that the editorial complained of is true or substantially true.

4. Plaintiff has failed to comply with the requirements of Chapter 770, Florida Statutes.

5. The publication complained of in the Complaint and First Amendment to Count III of Amended Complaint are not libelous at all, and, even if libelous, are not libelous per se, and plaintiff has failed to allege any special damages.

6. The Complaint and First Amendment to Count III of Amended Complaint fail to state with the required particularity the facts and circumstances upon which to base a claim for punitive damages.

SCOTT McCARTHY STEEL HECTOR & DAVIS
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By: DWIGHT SULLIVAN

[Certificate of Mailing omitted]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT JANUARY TERM, A.D. 1968

CASE NO. 67-661

ROBERT M. BRAKE,

Appellant,

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, and FRED SHERMAN,

Appellees.

Opinion filed March 19, 1968.

An Appeal from the Circuit Court for Dade County, Harvie S. DuVal, Judge.

Robert M. Brake, for appellant.

Scott, McCarthy, Steel, Hector & Davis and Dwight Sullivan, for appellees.

Before CHARLES CARROLL, C.J., and HENDRY and SWANN, J.J.

PER CURIAM.

In this action for libel the trial court first denied a motion of defendants to dismiss the complaint for failure to state a cause of action. Thereafter the defendants answered and moved for summary judgment, and the plaintiff moved for summary judgment as to liability. These motions were supported and opposed respectively by evidentiary matter. After hearing but prior to a ruling thereon the pleadings were amended, and defendants renewed their motion to dismiss. Thereupon the trial court

entered the order from which the plaintiff now appeals, denying the motions for summary judgment, granting the defendants' motion to dismiss for failure to state a cause of action and dismissing the cause. On consideration of the record and briefs, we affirm on authority of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. See also Curtis Publishing Company v. Butts, ... U.S. ....., 18 L.Ed.2d 1094, 87 S.Ct. .....

IN THE SUPREME COURT OF FLORIDA JANUARY TERM, A.D. 1968 MONDAY, JULY 8, 1968

CASE NO. 37,419

DISTRICT COURT OF APPEAL, THIRD DISTRICT

ROBERT M. BRAKE,

Petitioner,

DON SHOEMAKER, ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 449

ROBERT M. BRAKE,

Petitioner,

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, and FRED SHERMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 449

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vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, and FRED SHERMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Throughout this brief, we will refer to the Petition for Writ of Certiorari as "(Pet. .....)", to the Appendix thereto as "(Pet. App. .....)", to the Appendix to this brief as "(App. .....)", and to the Record as "(R.....)".

QUESTIONS PRESENTED

We prefer to restate the questions presented as follows:

1. Whether Or Not The Complaint As Amended Was Defective In The Light Of Applicable State And Federal Decisions.

2. Whether Or Not The Petition For Writ Of Certiorari Was Timely Filed.

STATEMENT

In his petition (Pet. 5), Brake says the trial court held the Complaint failed to allege actual malice. The trial court made no specific finding and entered an order (Pet. App. 18) granting the Motion to Dismiss which specified numerous grounds for the motion (Pet. App. 19-20).

In his petition (Pet. 11), Brake says the Supreme Court of Florida affirmed the judgment of the lower court. The Supreme Court of Florida denied Brake's Petition for Writ of Certiorari on the ground that it was "without jurisdiction" (Pet. App. 22).

Throughout his petition, Brake discusses at length the nature of the allegations that are necessary to state a cause of action in a Complaint for libel. He scarcely mentions or refers to the three publications upon which his lawsuit was based and includes only one in his Appendix, saying the other exhibits to the Complaint are "not essential to the decision of this cause" (Pet. 10). Because of those omissions, we discuss those publications here.

The Complaint As Amended

The August 26, 1962 Editorial. On August 26, 1962, The Miami Herald published an editorial written by Don Shoemaker, editor of The Herald, entitled "They Should Resign" (App. A1). The editorial was highly critical of five members of the Board of County Commissioners, Dade County, Florida, whose actions in walking out of a commission meeting resulted in the resignation of Irving McNayr, the County Manager.

The editorial said the five commissioners, of whom petitioner was one, had done a disservice to themselves and the community and that they had been out to get McNayr who refused to knuckle under to self-serving politicians. It stated that their political sharp-dealing was hurting the community and that the five should resign.

In Count I of the Complaint, petitioner alleged that the editorial defamed him by stating and implying that petitioner "was engaged in conduct which was unlawful or immoral or of doubtful legality or morality and that plaintiff lacked maturity" (Pet. App. 2).

The August 28, 1962 Cartoon. In its August 28, 1962 edition The Miami Herald published a cartoon in conjunction with an editorial that was a follow-up on the earlier editorial (App. A3) and was entitled "The People: Good and Mad" and sub-titled "Their Target: The Romper Boys". The editorial discussed the indignation and outrage of the people of Dade County at the tactics of the five commissioners who maneuvered the County Manager into resigning.

The cartoon that accompanied it depicted the five commissioners dressed in little boys' clothes dodging pots thrown by a woman labeled "Dade Citizens". The car-

toon suggested the commissioners had been trying to grab a pie labeled "Modern Government" from a window sill and that the "Dade Citizens" woman had frustrated them in their attempt.

In Count II, petitioner alleged that the cartoon defamed him because it "implies that plaintiff attempted to steal from the people of Dade County" (Pet. App. 4).

The August 25, 1964 Editorial. On August 25, 1964, The Miami Herald published an editorial written by Fred Sherman and entitled "Darrey Davis and Mr. Brake" (App. A5). The editorial came in response to a press release and other literature (App. A7, A9) issued by the petitioner at a press conference he had called (Pet. App. 11), in which he criticized the former County Attorney Darrey Davis for failure to fight the *Dupont Plaza* tax case[1] "with vigor" (App. A5).

Going to Mr. Davis' defense, the editorial recited his repeated warnings to the Metro commission to do something about the county tax roll and his prediction that the roll would be successfully challenged if the commission failed to act. It said that when Mr. Davis replied to Brake's charge and called him a political opportunist, he was too restrained.

The editorial discussed efforts to use the tax assessment crisis that followed the *Dupont Plaza* decision to weaken and wreck the Metropolitan Dade County form of government by the proposed amendments. (The first amendment would have required the County Commission to adopt, after a public hearing, manuals which would thereafter constitute "the standards and methods for as-

1. In *McNayr* v. *State ex rel. Dupont Plaza Center, Inc.*, (Fla. 1964) 166 So. 2d 142, the Supreme Court of Florida affirmed the judgment of the trial court which required that the assessments on the Dade County, Florida tax roll be doubled.

sessment of ad valorem tax rolls for Dade County". The second would have abolished the County Manager's job and substituted a strong mayor and required an election for all seats on the County Commission three months after the amendment became effective [R. 229-235]).

The editorial concluded that the "irresponsible minority" promoting the amendments were not going to wreck Metro by trading on the furor that followed the *Dupont Plaza* decision and suggesting that the passage of the amendments would circumvent the court's order in that case when in fact it would not.

In First Amendment to Count III of Complaint, petitioner alleged that the editorial was defamatory in that

a) "Said editorial impugned Plaintiff's ability and integrity as a lawyer by stating that 'he should know the law,' thus implying that although Plaintiff was a lawyer he did not know the law;"

b) the statement, "The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?", implied "that Plaintiff, as the lawyer-draftsman of the Amendments and the leader of the group circulating the Petitions, was giving false legal information to the general public."

c) the statement, "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?" implied "that Plaintiff did nothing as a County Commissioner to bring about a fair, equitable and lawful assessment roll," when in fact he had supported efforts to obtain a fair tax roll (Pet. App. 12-13).

ARGUMENT

Introduction

Petitioner discusses at length the requirements for pleading malice under Florida law or actual malice under the decisions of this Court in *New York Times Co.* v. *Sullivan,* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed. 2d 686 and those that followed it. In so doing, he infers that those were the only questions the Florida courts considered. This is not so.

Respondents' Motion to Dismiss directed to the Complaint as finally amended claimed the pleadings were defective, inter alia, because petitioner was a public official and a public figure and the Complaint did not allege actual malice, that the parts of the publications referred to were not libelous, and that it appeared from the Complaint that Count III was true or substantially true (Pet. App. 19-20).

In the trial court and in the District Court of Appeal, respondents argued that the Complaint was fatally defective under both Florida case law and the decisions of this Court dealing with the constitutional standard applied to public officials and public figures.

In the District Court of Appeal, Brake argued that the lower court erred in not granting his Motion for Partial Summary Judgment, and respondents argued that the decision of the trial court could also be upheld on the alternative ground that their Motion for Summary Judgment should have been granted (App. A11, A12).

What was and is the main consideration in whether the Complaint states a cause of action is what respondents published about petitioner that he is complaining about.

All the conclusory allegations in the world will not make a libel out of what is not libelous. All of the conclusory allegations in the world will not establish actual malice when the Complaint considered in its entirety shows there was none.

In any event, Petitioner did not file his Petition in this Court within the allowable time, and his attempt to seek review here comes too late.

POINT I

WHETHER OR NOT THE COMPLAINT AS AMENDED WAS DEFECTIVE IN THE LIGHT OF APPLICABLE STATE AND FEDERAL DECISIONS

What the Petitioner Is Complaining About

It is clear that petitioner had to give notice of intent to sue as provided by Chapter 770, Florida Statutes, before he could file suit. That requirement is jurisdictional. *Ross* v. *Gore,* (Fla. 1950) 48 So. 2d 412.

To comply with that statute, petitioner had to designate with particularity in his notice the parts of the publications he claims were false and defamatory. He could not sue later on parts of the articles not set out with particularity in his notice. *Hevey* v. *News-Journal Corporation,* (Fla. App. 1963) 148 So. 2d 543.

On August 27, 1962, petitioner wrote to The Miami Herald and demanded retractions of the following statements in the editorial of August 26, 1962:

1. "This newspaper knows of a certainty that Friday's shady business was long planned by the ringleaders."

2. The conduct of the five commissioners was "petty and childish."

3. They are "proposing to unload all manner of hacks and has-beens on Metro for managerial position." (App. A13)

In a letter to The Miami Herald dated September 17, 1962, petitioner clarified his earlier demand and asserted that the August 26, 1962 editorial falsely claimed that:

1. The first statement above implied that there was a conspiracy and petitioner was a party to it.

2. Petitioner's conduct in causing the lack of a quorum was "petty and childish".

3. Petitioner proposed to unload "hacks and has-beens" on Metro for the managerial position.

In the same letter, petitioner demanded a retraction of the August 28, 1962 cartoon, claiming the cartoon imputed that he had attempted to steal from the people of Dade County (App. A17).

On August 25, 1964, petitioner wrote to The Miami Herald complaining about an editorial that appeared on the same day (App. A21). He asserted that the following statements libeled him:

> "Bob Brake is a lawyer and he should know the law . . . The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?"

He claimed there was nothing in the petitions that promised or implied state law would not be enforced.

> "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?"

He said this statement impugned his integrity as a public official by implying he did nothing to bring about a fair tax roll during his term of office.

We are dealing then, with the cartoon and the parts of the articles petitioner designated in his notices of intent to sue.

Rules of Construction in Interpreting Allegedly Defamatory Statements

In Florida, as in other jurisdictions, the courts have developed rules and guidelines for construing statements that are alleged to be libelous.

Probably most important of all is to look at the publications complained of to see if they have the connotation ascribed to them in the pleadings. *Hevey* v. *News-Journal Corporation*, supra. If they do not, there is no case, *Ross* v. *Gore*, supra.

The particular language will not be given a tortured interpretation but should be construed as the common mind would understand it. It should not be interpreted by extremes. *Loeb* v. *Geronemus*, (Fla. 1953) 66 So. 2d 241; *Diplomat Electric, Inc.* v. *Westinghouse Electric Supply Co.*, (5th Cir. 1967) 378 F. 2d 377, 381-382.

The entire publication must be considered, including the position of the item in the article, the headline and the display of the article in connection with related publications. *Cooper* v. *Miami Herald Pub. Co.*, (1947) 159 Fla. 296, 31 So. 2d 382.

One test for determining whether an article is libelous is to consider whether the article as published has a different effect on the mind from that which the pleaded truth would have produced. *McCormick* v. *Miami Herald Pub. Co.*, (Fla. App. 1962) 139 So. 2d 197.

Another is to delete from the article the parts complained of to see if the article produces a different effect than it does with the allegedly defamatory portions included. *Hammond* v. *The Times Pub. Co.*, (Fla. App. 1964) 162 So. 2d 681.

Still another and obvious test is that if it appears from the pleadings that the allegedly defamatory matter is true or substantially true, it is not libelous. Inaccuracies not materially affecting the article's meaning are of no consequence. *McCormick* v. *Miami Herald Pub. Co.*, supra. It is for the court to make the initial determination. *Diplomat Electric, Inc.* v. *Westinghouse Electric Supply Co.*, supra.

Here, of course, there is the overriding interpretation of publications coming under the constitutional privilege of *New York Times* and *Curtis Publishing Company* v. *Butts*, (1967) 388 U.S. 130, 87 S.Ct. 1975, 18 L. Ed. 2d 1094.

An application of various of these tests to the parts of the two editorials complained of and to the cartoon shows in each instance that the publicattion is not libelous.

The August 26, 1962 Editorial

If we apply the test used in *Hammond* v. *The Times Pub. Co.*, supra, that is, delete the parts of the article complained of, then read the deleted article and see if it leaves the same effect—the August 26, 1962 editorial reads the same way.

As the headline to the editorial ("They Should Resign") suggests, the thrust of the editorial is that the five commissioners who forced the County Manager to resign did so by questionable tactics and should either quit or be forced out of public office.

The editorial describes their acts as "political sharp-dealing" and says they have done a disservice to themselves and to their community. With or without the parts of the editorial, petitioner complains of, its impact is the same.

If we single out the three excerpts from that editorial that petitioner complains about, we reach the same result.

"Petty and childish." *In White* v. *Fletcher*, (Fla. 1956) 90 So. 2d 129, the court affirmed a summary judgment for the defendant who had stated that the plaintiff was unfit to be a police officer. The court said:

> "As expressed by Mr. Justice Terrell in Kennett v. Barber, 159 Fla. 81, 31 So. 2d 44, 46, this Court held:
>
> > 'We think the rule is now generally accepted that any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that *they* may determine whether it squares with such a standard of integrity and correct morals as warrants their approval.' (Emphasis added).
>
> "The uniformed policeman, therefore, was certainly subject to fair comment and criticism from any member of the public of the City of Orlando. The generally accepted rule is that 'public officials' or 'public men' are subject to such fair comment."
>
> 90 So. 2d 131.

In the *New York Times* case, this Court said debate should be "uninhibited, robust and wide-open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

Calling the conduct of the five commissioners "petty and childish" falls far short of what is allowable under the Florida law or the *New York Times* case.

That petitioner was part of a conspiracy. In his letter of August 27, 1962 (App. A13) petitioner adopts as accurate a Miami Herald article which reported he had had lunch with Hughlan Long, another commissioner. According to the article, Brake advised Long that if Long tried to introduce a resolution at the Commission meeting that afternoon which restricted the County Manager's political activities and any substantial vote was cast for it, that McNayr would resign.

From petitioner's own pleadings, it appears he knew in advance that his fellow commissioner, Long, planned a move that would result in the County Manager's resignation and was trying to enlist support for it, and that Brake and four other Commissioners later walked out of a Commission meeting, thereby precipitating the County Manager's resignation.

From petitioner's own pleadings, it appears that the comment was substantially true. *McCormick* v. *Miami Herald Pub. Co.*, supra.

"Hacks and has-beens." Although allegedly seeking review in this Court because of a federal constitutional issue, petitioner argues (Pet. 22) that *Hevey* v. *News-Journal Corporation*, supra, is authority for him here.

We submit the *Hevey* case has been modified by the *New York Times* case. For example, in the *Hevey* case, the court said a high degree of care was required of newspaper publishers to avoid the commission of wrongs in the publication of false articles or news.

Contrast *New York Times* where it was admitted that part of the advertisement was inaccurate and that the

newspaper had in its news files information that would have revealed the errors if a check had been made. This Court said that at most it showed negligence and was insufficient to establish actual malice.

The authority of that decision here where petitioner is admittedly a public official-public figure is doubtful in the light of such decisions as *Pauling* v. *Globe-Democrat Publishing Co.*, (8th Cir. 1966) 362 F. 2d 188, certiorari denied 388 U.S. 909, and *Washington Post Company* v. *Keogh*, (D.C. Cir. 1966) 365 F. 2d 965, certiorari denied 385 U.S. 1011. See also, the 1942 case of *Sweeney* v. *Patterson*, (D.C. Cir.) 128 F. 2d 457, certiorari denied 317 U.S. 678, cited with approval in *New York Times*.

Even if the *Hevey* decision were otherwise controlling, petitioner here failed to allege the actual malice or knowing falsity he admits is required.

In his Complaint, petitioner alleged only:

> "That Defendant knew that the allegations of said editorial were untrue as to Plaintiff *in that* on the preceding day, on Saturday, August 25, 1962, Defendant newspaper carried a story by one GEORGE LARDNER, then the courthouse reporter for Defendant, in which said reporter described a luncheon, attended by said reporter, at which the Resolution complained of in the editorial was discussed and said article shows clearly that Plaintiff did not participate in the drafting of said Resolution and in fact attempted to persuade the author of said Resolution to withdraw it." (Emphasis supplied).

(Pet. App. 2)

If this can be construed as an allegation of knowing falsity, it goes at most to the move to force the County Manager's resignation and not to proposals for his successor. In fact, the 1962 editorial did not even mention a resolution. Petitioner's pleading is a non sequitur.

The Cartoon of August 28, 1962

In Paragraph 11 of his Complaint (Pet. App. 4), petitioner alleges that the cartoon that appeared in The Miami Herald on August 28, 1962 implies that he had attempted to steal from the people of Dade County and had engaged in conduct which was unlawful or immoral or of doubtful legality. He claimed the same thing in his letter of September 17, 1962, demanding a retraction (App. A17).

Viewed by ordinary, and not tortured, rules of construction, the cartoon contains no such implication. The cartoon obviously must be construed along with the editorial immediately adjacent to it entitled "The People: Good and Mad" and sub-titled "Their Target: The Romper Boys". The editorial refers to the indignation of the people of Dade County which occurred after a "minority on the Metro Commission jostled County Manager Irving McNayr into resigning."

Interpreting the cartoon as the common mind would understand it, and not by extremes, it is clear that it refers to the angry reaction of the people of Dade County to the action of the five commissioners who maneuvered McNayr into resigning, thereby weakening the concept of Dade County's Home Rule government. Taken literally, the cartoon indicates that the five commissioners had been frustrated in their attempt to deprive Dade County citizens of modern, efficient government by the indignation of the people of the county. There is no suggestion that petitioner or the other four commissioners were stealing or doing anything illegal.

The cartoon criticizes allegorically plaintiff's judgment and his tactics in forcing the County Manager's resignation and as such is not libelous.

If newspapers cannot print cartoons such as this without the threat of libel judgments, the result will be the very "self-censorship" which this Court deplored in *New York Times* (376 U.S. 279).

The Second Editorial

As with the first editorial, we submit that the parts of the editorial petitioner complains of could be deleted without changing the overall import or meaning. *Hammond* v. *The Times Pub. Co.*, supra.

The editorial takes petitioner to task for his criticism of Darrey Davis for supposedly mishandling the *Dupont Plaza* tax case as County Attorney. It calls petitioner a "Metro wrecker" and says "political opportunist" is too polite a term for him.

It says the Metro commission had been warned again and again during the time petitioner was a commissioner that the tax roll would be successfully challenged and yet allowed it to happen. It warns that an "irresponsible minority" is trying to use the tax assessment crisis in a misleading way to ruin Metro.

Without the sentences petitioner singles out, the impact is the same.

"Bob Brake is a lawyer . . ." In his letter of August 25, 1964, and again in his petition (Pet. 8), petitioner tries to tie the statement "Bob Brake is a lawyer and he should know the law" to the last two paragraphs of the editorial dealing with the petitions. As he interprets the editorial, it reads:

> "Bob Brake is a lawyer and he should know the law. . . . The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?"

Actually, the words appeared in the editorial this way:

> "Bob Brake is a lawyer and he should know the law. Instead of complaining that Darrey Davis didn't oppose the Dupont Plaza suit with enough 'vigor', Mr. Brake should have acknowledged the facts.
>
> "When Bob Brake went on the Metro commission in 1962, the county was on notice to obey the Florida law on assessment. The court had been promised we would obey that law. But two more years were to go by while County Attorney Davis fought tax suits in the courts and pleaded with his own commissioners to achieve a tax roll that would satisfy the law. Over and over again he warned that he could not continue to hold off law suits filed by property owners who were carrying more than their fair share of the county tax load. * * *
>
> "The anti-Metro petitions now being circulated promise that. . . ."

To arrive at the construction he urges on this Court, petitioner deletes almost 300 intervening words. Again, he uses a tortured construction, not the meaning the common mind would give to those words.

A fair reading of the "Bob-Brake-is-a-lawyer" sentence is that instead of complaining about Darrey Davis' handling of the *Dupont Plaza* case, petitioner should have acknowledged that Mr. Davis was faced with an impossible task in defending it. (A conclusion supported also by the excerpts from the trial record included in Exhibit O to First Amendment to Count III of Complaint [R. 240-261].)

Petitioner admittedly did criticize Mr. Davis, saying he did not defend the case with "vigor" (App. A6). He does not contend that the reference in the editorial to Mr. Davis' statement about the inevitability of a success-

ful challenge to the tax roll is false. It appears from the Complaint that the statement is accurate and the comment on it fair. *McCormick* v. *Miami Herald Pub. Co.*, supra.

"Where was Bob Brake, and what was he doing as a Metro Commissioner?" Petitioner alleged (Pet. App. 13) the implication of this sentence was that he did nothing to correct an unfair tax roll while he was on the Metropolitan Dade County Commission and was therefore derelict in his duty as a public official. In his First Amendment to Count III of Complaint, Paragraph 18 (i) B, he alleges "he supported every effort to obtain a fair tax roll during his eighteen (18) months as a County Commissioner . . ."

The answer is that respondents had every right to ask what petitioner had done about the tax roll when he was a commissioner. In 1964, after he was out of office, he was holding himself out as an expert on county taxes and sponsoring an amendment to the Metro Charter which would, according to the petition, "Set up a standard covering tax assessments and the method of assessment to be followed." (Exhibit I to the Complaint, R. 229-235).

The decision in the *Dupont Plaza* case certainly indicated that whatever had been done about the county tax roll up until 1964 was inadequate. Yet, petitioner, a former officeholder, sponsored Metro Charter amendments immediately after the court had ordered the assessments on the tax roll doubled. With this much expertise available after the fact, it was most logical to ask what he had done about the problem when he was in office.

Petitioner attempts to answer the rhetorical question in his Complaint (Pet. App. 13) where he alleged he supported all efforts to obtain a fair tax roll including voting

to hire Hunnicutt & Associates and protesting assessment procedures on July 22 and 23, 1963.

We submit that this is a classic example of the situation where the article as published would have had no different effect on the mind than that which the alleged truth would have had. *McCormick* v. *Miami Herald Pub. Co.*, supra. To have included that matter in the editorial would not have changed the meaning or import of the sentence.

We submit it is a classic example, too, of the kind of discussion of public issues and people who by their own activities thrust themselves into the "vortex" that *New York Times* held so essential. The question was not libelous and was germane to the discussion petitioner had begun.

> **"The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced.**
>
> **"Could anything be more dishonest?"**

As set forth above, petitioner tries to tie this language to the "Bob-Brake-is-a-lawyer" sentence several paragraphs above it. This construction is obviously strained and as a matter of law his interpretation cannot be sustained. But the words are not defamatory even if they are not tied to that sentence.

In his Complaint (Pet. App. 12-13), petitioner alleges "that nothing in the said petitions, or any statement made by or under the control of plaintiff, alleged that state law would not be obeyed."

The exhibits attached to the Complaint show that the contrary is true. In other words, the pleadings themselves show that the statements complained of are substantially true.

Petitioner was the author of the press release (Exhibit Q) and called a press conference at his office to announce it. He released it in conjunction with a booklet entitled "The McNayr Testimony" (Exhibit O to the Complaint, R. 240-261) and another press release (Exhibit P to the Complaint, R. 262-264). He claims the purpose was to explain the need for the two charter amendments to the public (Pet. App. 11-12).

"The McNayr Testimony" discussed the "cordial atmosphere of sugary flattery" in which the *Dupont Plaza* case was tried and stated that County Attorney Darrey Davis' comments to the court in that case were "absolutely without foundation" (App. A10). The booklet concluded by accusing the county witnesses and Mr. Davis of either complete stupidity or complete chicanery. It stated:

> "On the other hand the spurious testimony may have been deliberately contrived. What reasonable motives could justify the degrading of a circuit court of the State with lies is difficult to conceive."

Petitioner's own press release was slightly more restrained but still dealt principally with the *Dupont Plaza* tax case and was highly critical of Mr. Davis and all the county officials involved in that case.

It is significant that these three pieces of literature which petitioner alleges were distributed to explain the need for the charter amendments do not really explain what the proposed amendments would accomplish. They were designed to trade upon the furor that followed the decision in the *Dupont Plaza* case. While none of this campaign literature expressly says the *Dupont Plaza* decision would be nullified if the Metro Charter were amended, that is the clear implication.

When petitioner says that the petitions themselves do not promise that the state law on assessment will not be obeyed, he is correct. But the petitions and the campaign propaganda that went with them clearly conveyed that impression, and were so understood at that time in Dade County (See Exhibit J to the Complaint, R. 236).

Returning then to the standards for interpreting allegedly libelous language, this is another instance where there is no difference in effect between the language as printed and the actual fact. Petitioner says the editorial is false when it says, "The anti-Metro petitions now being circulated promise . . .". We say that it would have been entirely accurate to say "The propaganda circulated by those sponsoring the anti-Metro petitions promises . . ." and that there is no real difference between the two.

Petitioner's argument that he had no opportunity to rebut what was published about him in the second editorial (Pet. 23) simply does not fit the facts. That editorial was in response to petitioner's unrestrained public attack on the former County Attorney.

As such, petitioner comes squarely within the holding in *Pearson* v. *Fairbanks Publishing Co.*, (Alaska 1966) 413 P. 2d 711. See also, Bertelsman, "Libel And Public Men," 52 American Bar Association Journal 661-662 (1966).

POINT II

WHETHER OR NOT THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED

Petitioner prays for a Writ of Certiorari to review the judgment of the Supreme Court of Florida and of the District Court of Appeal of Florida, Third District (Pet. 1).

The Supreme Court of Florida did not enter a judgment. On July 8, 1968, it denied Brake's Petition for Writ of Certiorari, not on discretionary grounds, but because it was "without jurisdiction" (Pet. App. 22). Thus, the only review petitioner can seek is a review of the decision of the District Court of Appeal "the highest court of a state in which decision could be had". 28 U.S.C. § 1257(3); *Nash* v. *Florida Industrial Commission*, (1967) 389 U.S. 235, 88 S.Ct. 362, 19 L. Ed. 2d 438; *Randall* v. *Board of Commissioners*, (1923) 261 U.S. 252, 43 S.Ct. 252, 67 L. Ed. 637.

His attempt to seek such review comes too late. The opinion of the District Court of Appeal was filed on March 19, 1968. There was no timely petition for re-hearing, and the mandate of the court was issued on April 4, 1968.

The Petition for Writ of Certiorari was filed in this Court on August 28, 1968, 162 days from the date of the opinion, and 146 days from the date of the mandate of the District Court of Appeal.

Title 28, U.S.C., Section 2101(c) provides that the writ may be applied for within ninety (90) days but that for good cause the time for filing a petition may be extended for an additional sixty (60) days. No such extension was requested by petitioner.

Brake was not forced to choose between seeking review either in the Supreme Court of Florida or in this Court. He could have done both by requesting an extension of time within the original ninety-day period.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SCOTT MCCARTHY STEEL HECTOR & DAVIS

By .....

WILLIAM C. STEEL
Counsel for Respondents
14th Floor First National Bank Bldg.
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief In Opposition To Petition For Writ Of Certiorari was served by mail upon ROBERT M. BRAKE, ESQ., Petitioner, 1830 Ponce de Leon Boulevard, Coral Gables, Florida, this 25th day of September, 1968.

.....

Of Counsel

EXHIBIT A TO COMPLAINT

An Editorial

They Should Resign...

LONG

SASSO

PATTEN

HALL

BRAKE

THE FIVE Metro commissioners who cleverly forced the resignation of County Manager Irving McNayr poorly served their community and themselves.

If they have any sense of decency about what they have done they will resign.

Their conduct was petty and childish. It reflected the immaturity of some species of politicians the people of Dade County must suffer because few grown-ups will seek public service.

THIS NEWSPAPER knows of a certainty that Friday's shady business was long planned by the ringleaders.

They contrived to "get McNayr," who would not stand for any foolishness from self-serving politicians and place-holders.

What they "got," however, was another ugly mark on the good name of this community, which had begun to shake off its reputation for unstable government.

Even now they are proposing to unload all manner of hacks and has-beens on Metro for managerial positions.

Fortunately, Hughlan Long, Tom Sasso, Arthur Patten, Chuck Hall and Bob Brake are only a minority.

It is more than coincidental that four of them represent districts, the worse source of Metro's ward politics.

★ ★ ★

UNFORTUNATELY, however, the Metro Charter provisions which govern the recall of office-holders would apply to only one of the five at this time. He is Commissioner Hall, and Chuck is hardly worth a special election — whatever he does.

Lacking a proper outlet for their indignation, the people can only demand that these five give back the trust which the public placed in them.

If they do not resign, then the majority of Metro should seek means of protecting this community against the sort of political sharp-dealing that is sapping its life as surely as it is destroying its honor.

★ ★ ★ ★ ★ ★ ★ ★ ★

EXHIBIT E TO COMPLAINT

The Miami Herald

JOHN S. KNIGHT, *Publisher* — JAMES L. KNIGHT, *President*

LEE HILLS, *Executive Editor* — ALVAH H. CHAPMAN Jr., *General Manager*

DON SHOEMAKER, *Editor* — GEORGE BEEBE, *Managing Editor* — JOHN D. PENNEKAMP, *Associate Editor* — ARTHUR J. GUCKER, *Business Manager*

Published Daily at 200 S. Miami Avenue, Miami 30, Florida

6-A — Tuesday, August 28, 1962

Their Target: The Romper Boys

The People: Good And Mad

IF YOU LIVE in Dade County you live in a community that is good and mad today—mad clear, clean through.

Its indignation finds voice in the storm of letters on this page and the next one. They were not solicited. They represent only a part of the first mail since a minority on Metro Commission jostled County Manager Irving McNayr into resigning.

We have never known this community to react to any public issue with such vigor and such unanimity. Taken together with a wave of telephone calls, it means one thing:

The people believe ever more firmly in Metro and resent any tampering with it by city hall politicians on the outside and anti-Metro commissioners on the inside.

By these and other means the Romper Boys know now that their childish display of pique against Mr. McNayr is a disservice to the very Charter which they swore to uphold.

* * *

THE ISSUE, of course, is a long advertised play for power by the political professionals.

A strong Charter and a strong county manager stood in their way.

With the help of a managed vote, the Charter was weakened and opened to jobbery.

With the phony issue of whether Mr. McNayr could speak out on "political" matters (i.e., defend the Charter that he, too, had promised to uphold), the Romper Boys succeeded in maneuvering him into a position from which there was no honorable retreat.

Who indeed would wish to serve with this bloc which does not want a strong manager but a weak sister?

* * *

IN THE USUAL haste and amidst the usual guff about a "local" county manager, efforts are being made to replace Irving McNayr.

We think it far more important to replace the Romper Boys, who do not seem to have the grace to resign, and to undo the wrongs of the Crandon amendments.

After that we can worry about getting a permanent county manager.

No man worthy of the name would hire out to Dade County in the present circumstances.

First it must set its own house in order.

* * *

AN EFFORT also is already under way to manufacture opinion in favor of the Messrs. Long, Sasso, Patten, Hall and Brake.

Unwary people are being asked to write letters to this newspaper by an anonymous telephone voice.

This will fail because it is false.

Here in our columns today the people speak their indignation by an overwhelming majority.

All is not lost.

Indeed, much may have been gained.

At long last Mr. and Mrs. Dade have come out of their corner, fighting mad.

They want good government.

They want it under Metro.

This is not the end, but the beginning.

Surprise, Boys

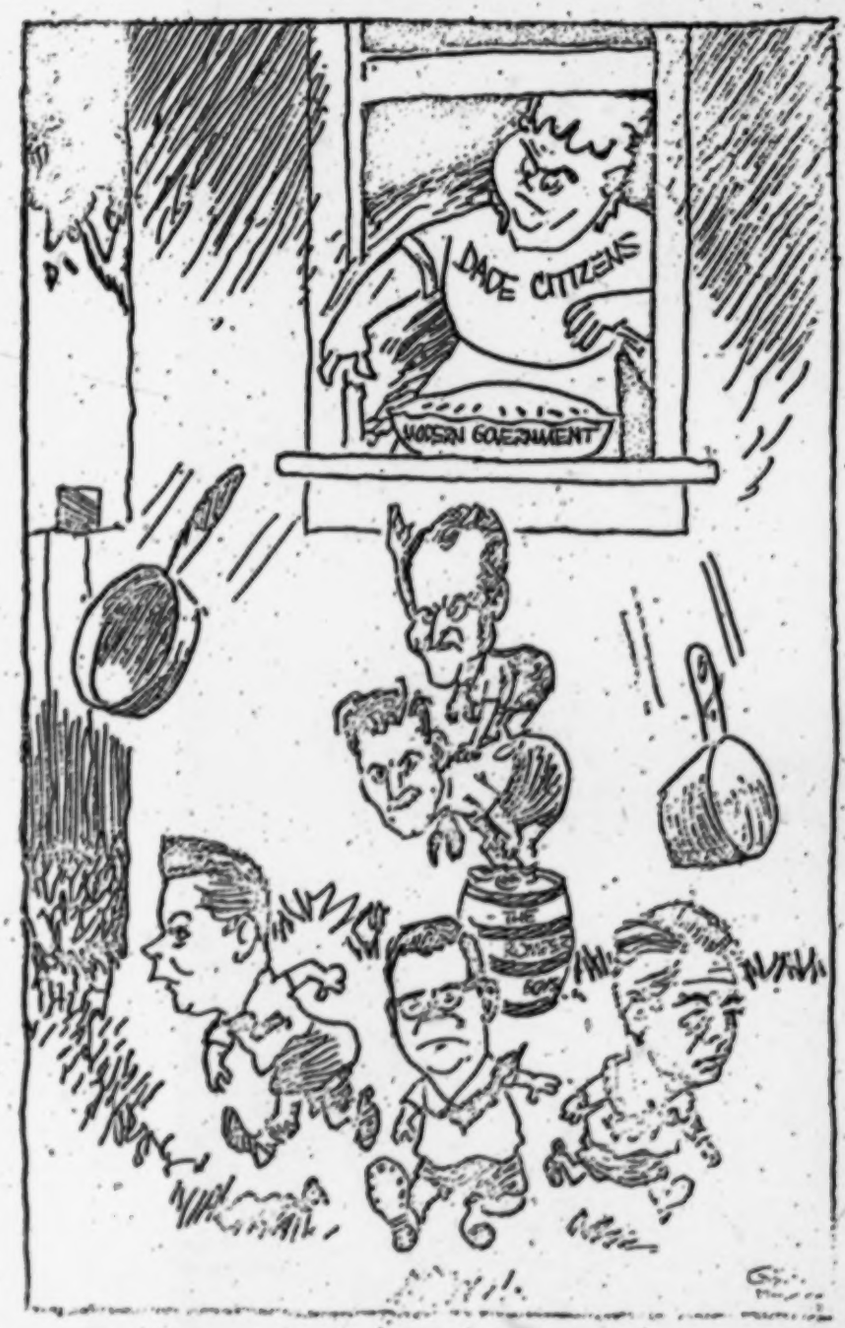

EXHIBIT H TO COMPLAINT

Darrey Davis And Mister Brake

THE ONE MAN who always played it straight and honest with the people he was working for is now under attack by Robert Brake and his gang of Metro-wreckers.

Darrey Davis, who served Dade as its county attorney seven years and pulled it through countless political assaults, is now accused of mishandling the Dupont Plaza Hotel suit that led to the court-ordered doubling of the tax roll. It is a credit to the mild manner and even temper of Mr. Davis that he only called the Brake Gang "political opportunists." He could have used sharper language with good cause.

Bob Brake is a lawyer and he should know the law. Instead of complaining that Darrey Davis didn't oppose the Dupont Plaza suit with enough "vigor," Mr. Brake should have acknowledged the facts.

When Bob Brake went on the Metro commission in 1962, the county was on notice to obey the Florida law on assessment. The court had been promised we would obey that law. But two more years were to go by while County Attorney Davis fought tax suits in the courts and pleaded with his own commissioners to achieve a tax roll that would satisfy the law. Over and over again he warned that he could not continue to hold off law suits filed by property owners who were carrying more than their fair share of the county tax load.

As Mr. Davis said this past weekend, "By reason of the 103 law suits attacking the county's tax rolls since 1961, it was apparent to everyone that someday the roll would be successfully challenged if it were not made to comply with the requirements of the Constitution and the statutes." If this were the first time Mr. Davis had said this, you would accuse him of most anything. But the county attorney said this back in 1961 and he kept repeating it. Where was Bob Brake and what was he doing as a Metro commissioner to make Dade County comply with the Florida assessment law?

The court-ordered assessment crisis has given hope to an irresponsible minority attempting to overturn the first stable commission government Dade has had since Metro was created. It is a sign of that irresponsibility when the reputation of Darrey Davis is attacked.

We refuse to believe that Metro can be wrecked on the issue of fair taxation ordered under Florida law.

The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced.

Could anything be more dishonest?

EXHIBIT Q TO COMPLAINT

Robert Brake's Press Release, August 20, 1964

The County Attorney has written a memorandum purporting to explain the causes of Dade County's doubled tax roll. He implies tht the sole cause is Judge Smith's interpretation of Florida law.

On the contrary, the direct cause of the ruling of Judge Smith was the testimony of County Manager Irving McNayr and his two subordinates, Deputy Tax Assessor Elcook and Auditor A. J. Blake. But even more important is the fact that the testimony of all three men was not true.

1. The testimony of these three men was that a) Dade County had a uniform and equal tax roll, and b) that it was at 50% of just value. Since the law calls for full just value, Judge Smith had no choice but to enter the order directing that a roll be prepared which was at "full just value".

2. However, Mr. McNayr and his subordinates had several choices. They could have pointed out to Judge Smith—as McNayr and the Hunnicut report pointed out to the County Commission in April, 1964—that the tax roll was not equal. Even the Miami Herald and former County Attorney Darrey Davis admit that the roll is unequal and unfair. The *only* time that *anyone* ever said that Dade County's tax roll was fair and equal was in court—and the people who made such untrue statements are appointed and not subject to the vote of the people.

We have had an independent study made of Dade County's tax roll. Mr. Charles Kimball, who has had considerable experience in Dade County, has furnished us with documented proof that Dade's tax roll is unequal and unjust. A copy of his report is being distributed to all news media in Dade County.

The County Attorney is wrong when he says that we have no choice but to accept Judge Smith's order. It is true that the County failed to fight the Dupont case with vigor—even to the extent of failing to ask for a rehear-

ing. But a taxpayer's suit can be filed which will challenge the entire tax roll as being unjust and unequal.

Contrary to the County Attorney's memo, the number of homeowners dissatisfied with the McNayr assessment policy is not "less than 10%" but nearer 30%. It is that the Commission does nothing to help these people —until one remembers that they represent—and in some instances include—those who will financially benefit from the Commission's present, do-nothing policy.

We believe that the time has come for action. We believe that the injustices of the tax roll can be exposed and alleviated by a taxpayer's suit, and have directed the preparation of such a suit. We also believe that the only way to return government to the people is to make those officeholders who were responsible for such false testimony subject themselves to the vote of the people.

This—and not the trumped-up statements distributed by the mass media—is the reason for our actions.

COMMITTEE FOR RESPONSIBLE GOVERNMENT
August 20, 1964

EXHIBIT P TO COMPLAINT

Press Release of Charles Kimball

PART III THE VERDICT

The testimony of Irving McNayr, Samuel Elcook and A. J. Blake in the Dupont Plaza case is subjected to detailed analysis in the report I am releasing.

This study revealed a disparity between Court testimony and the facts. In publishing this study I was motivated by a dedication to fairness and truth coupled with a depressing dismay at the apparent dishonesty of certain public officials.

In testimony before Judge Smith, Mr. McNayr said he felt that the County tax assessor's office had come as close as reasonably possible in attaining an equalized tax roll. (Page 5) Mr. Elcook testified before Judge Smith that the roll had been equalized at only "slight deviations" (Page 6) and Mr. Blake, the County auditor, testified that the tax roll was no more than a percentage away from being equalized at 50%. (Page 6)

Using data collected from standard research procedures, I have concluded:

1) The larger hotels sold in the first half of 1964 are all over assessed and not one is assessed within $60,000 of market value. (Page 9)

2) A random sample of sales of service stations or sites shows that not one station is assessed within $20,000 of market price and all are under assessed. (Page 10)

3) Assessments in various subdivisions vary from 24% below recent market values to 18% above. (Page 12)

4) Assessments on undeveloped land generally are 40% of real value or lower. (Page 13)

5) Assessments on potential apartment sites are generally 40% of real value. (Page 14)

6) On the whole the tax roll is biased in favor of commercial properties and against homes. (Page 16)

7) 70-90% of homes in various parts of Dade County are over assessed. (Page 16)

8) A majority of industrial sites and plants are under assessed.

9) The assessment discriminates against industrial sites and plants in Hialeah, when compared with the rest of the county. (Page 18)

10) The tax assessment discriminates against apartments in Miami Beach and older structures. (Page 20)

While the tax roll on its face is decisively inequitable and has been constructed with complete disregard for recorded sales prices, the examination of the actual 1964 assessments reveals that the critical testimony of McNayr, Elcook, and Blake, and the commentary by Mr. Davis was absolutely without foundation.

The testimony that the 1964 tax roll reflected 50% valuations on a uniform and equal basis and current market prices is specious, untrue, and false. There was never and is not now tangible evidence to support the claim that acreage, improved property, or residences, were valued using the same formula. Realistically the tax roll is chaotic, discriminatory, unequal, and without uniformity.

A high degree of incompetence is decisively demonstrated.

EXHIBIT O TO COMPLAINT

Excerpt from "The McNayr Testimony"

Judge Smith's decision which resulted in the doubling of the tax roll was appealed but without success. County officials had testified that assessments were prepared with the same formula, one based on market value, and that it was applied uniformly to all types of property. Assessments varied only a "percentage". It is important to remember that the testimony of McNayr, Elcook, Blake, and the comments of Davis were *never substantiated* by any evidence, studies, surveys, or reports of any kind. The 1962 and 1963 samplings by Mr. Blake were *never exhibited*. Judge Smith's decision was based largely on the verbal conclusions of certain county officials he should

presume knew what they were talking about. The Hunnicut report, even though it contained no statistical studies, and which was at considerable variance with the statements of McNayr, Elcook, and Blake, was summarily downgraded and dismissed with no objections from the defense. In every respect the testimony of county officials totally confirmed charges in Sibley's initial petition. The only defense offered by Davis, that the new law necessitated further reviews of assessments, was fully negated by Elcook's testimony that full cash and just values were identical—obviously implying that no review was really necessary. In effect the county was without any defense and made no attempt to repel the petition. Instead, in a cordial atmosphere of sugary flattery, McNayr, Elcook, and Blake carefully and consistently cooperated in the construction of Mr. Sibley's "concrete" contentions.

The examination of the actual 1964 assessments reveals that the critical testimony of McNayr, Elcook, and Blake, and the commentary by Mr. Davis (quoted in Part I of this report), was absolutely without foundation. The testimony that the 1964 tax roll reflected 50% valuations of all taxable property on a uniform and equal basis, current market prices, is specious, untrue, and false. There was never and is not now tangible evidence to support the claim that acreage, improved property, or residences, were valued using the same formula. Realistically the tax roll is chaotic, discriminatory, unequal, and without uniformity.

While it may be that the county officials involved were ignorant of the true condition of the tax roll, if they were their competence is not only open to serious question, but a high degree of incompetence is decisively demonstrated. On the other hand the spurious testimony

may have been deliberately contrived. What reasonable motives could justify the degrading of a circuit court of the State with lies is difficult to conceive. The consequences of this reckless prevaricating have resulted not only in an even more inequitable redistribution of the tax load, but has irrevocably disgraced the metropolitan government of Dade County.

EXCERPT FROM BRIEF OF APPELLANT IN DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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EXCERPT FROM BRIEF OF APPELLEES IN DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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EXHIBIT D TO COMPLAINT

Notice of Intent to Sue Dated August 27, 1962

(Seal)

Board of County Commissioners

METROPOLITAN DADE COUNTY-FLORIDA

1017 Courthouse , Miami 32, Florida FRanklin 7-1911
Robert M. Brake
Commissioner

August 27, 1962

The Miami Herald
200 South Miami Avenue
Miami, Florida

Attention Mr. Don Shoemaker

Gentlemen:

Re: Editorial Retraction

I have seen the editorial printed by you on page 1-A of the City Edition of the Miami Herald on Sunday, August 26, 1962. Request is hereby made under the provisions of Florida Statutes 770.02 to make a retraction concerning myself as to the following matters:

1. You state that "this newspaper knows of a certainty that Friday's shady business was long planned by the ringleaders." This statement is false as concerns myself and is known by the personnel of your newspaper to be false. I call your attention to the story on page 1-C of your City Edition for Saturday, August 25, 1962, and 18-C of the early edition of your Sunday newspaper. Mr. George Lardner, your courthouse reporter, was present at a luncheon meeting attended by Mr.

Long, Mr. Hall, Mr. Boyd and myself. He stated in his story that Mr. Long "was sounding out views." He also reported that I told Mr. Long that I believed that what he wanted could be worked out informally with Mr. McNayr without the necessity of a resolution. I am sure Mr. Lardner will also confirm that I told Mr. Long that I was of the opinion that if Mr. Long's resolution, which he had tried to introduce that morning, came to a vote, and any substantial vote was cast in favor of it, then Mr. McNayr would resign. Mr. Hall agreed with my position, and we both requested Mr. Long to ask for an informal meeting rather than to present a resolution.

Mr. Lardner was also present at a conversation between Mr. Patten, Mr. Winston Wynne and myself on the courthouse steps after the Commission meeting broke up. At that time I explained to Mr. Wynne that I had left the meeting for the following reasons:

First, the meeting had formally adjourned, and we were in an informal discussion. As was to be expected, hot words had resulted, and I believed that time was needed for the principals to reflect upon the discussion and make decisions free from the heat of the moment. I further stated that I believed that a formal meeting was not only inadvisable, but illegal inasmuch as a majority of the Commission had not waived formal notice of the meeting. Since the business of the day was finished, I felt nothing could be accomplished by remaining so I left.

I am sure that you will agree that my actions on Friday were not "long planned" with anyone, but were taken by myself as each situation arose with a view to encouraging harmony on the Commission and between the Commission and the County Manager.

2. You call this conduct "petty and childish". Even if a special formal meeting of the Commission had been called legally, a walkout to prevent a quorum is a time-honored, historical, parliamentary technique. It is used not only to prevent an otherwise illegal meeting, but also to allow tempers to cool and to prevent hasty action as well as to bring a new problem to the attention of the public so that citizens may express their views. Any statement to the contrary, must be made out of malice or ignorance of parliamentary, constitutional history. I wanted to prevent both Mr. McNayr and Mr. Long from taking precipitative action. Unfortunately, Mr. McNayr did not appreciate what I was doing for him.

3. Your editorial states that I am "proposing to unload all manner of hacks and has-beens on Metro for managerial position." I have not named any person, and have no one specifically in mind for this position. I have, however, noted that the names of several men, whom I regard as outstanding, have been mentioned. Do you think, for example, that Mr. Ira "Dutch" Willard, the former City Manager of both Coral Gables and Miami, and the former President of the City National Bank of Coral Gables, is a "hack or a has-been?"

I believe that a county manager should be above politics so that regardless of political shifts, he may continue as manager and provide a continuity of direction and service to the government. If a manager becomes a spokesman for any political group, even if it should be a majority of the Commission, he exposes himself to the danger of forcible removal should such group fail to be re-elected. The Cities of Coral Gables and Miami Beach, among others, have seen many stormy, political battles within their respective Commissions, and yet their City Managers have had long tenure. The reason is because they have re-

frained from political activity. I agree with the editorial in last Thursday's Coral Gables Times, one of your subsidiaries, that certain members of the Commission have in the past advocated their own roles of leadership and pushed Mr. McNayr to the fore as a spokesman for Metro. I agree that this has compromised his position. I think both he and Dade County would be better served if he, or any county manager, would remain above politics. I, for one, am ready to accept my responsibility as a Commissioner for defending this government, and I believe that by doing so, and that by letting the manager stay in the background, we will all have a better Metro Government.

I respect your right to disagree with my actions. I do not, however, believe that you should falsify my actions and cast aspersions upon my motives. These aspersions were false, and this was known by the personnel of your paper to be false. I hereby request that you retract these statements and present a clarification of my stand to your readers.

Very truly yours,

Robert M. Brake
County Commissioner

RMB/ns

EXHIBIT F TO COMPLAINT

Notice of Intent to Sue Dated September 17, 1962

September 17, 1962

Mr. Don Shoemaker, Editor
The Miami Herald
200 South Miami Avenue
Miami, Florida

Dear Mr. Shoemaker:

I am in receipt of your letter of August 31, 1962, replying to my letter of August 27, 1962, in reference to your editorial on the front page of the City Edition of the Miami Herald on Sunday, August 26, 1962.

As I stated in my previous letter, I agree that your newspaper has a right to comment fairly upon my actions as a public official. I also agree that I have no quarrel with the news articles in your paper.

However, in order to give your editorials a qualified privilege under the fair comment rule, they must be based upon true statements of fact; must be confined to comments on the matter itself; and must not descend to personal attacks on the private character or impute unworthy motives to those who are the object of your criticism. In this regard, may I recommend for your consideration the opinion of the Third District Court of Appeal of Florida in the case of Miami Herald Publishing Company vs. Brautigam, 127 So 2d 718 (particularly the columns on pages 722 and 723).

As I pointed out in my prior letter, your editorial of August 26th not only is defamatory in implying that my conduct was founded on base motives, but also because of

at least three misstatements of fact made by you in the editorial, to-wit:

1) That there was a conspiracy and that I was a party to it.

2) That causing the lack of quorum was "petty and childish" when in fact it is a time-honored parliamentary device used to prevent a minority (in this case a minority of 6) from taking action which might not command a majority if the absent members of the Commission were present; and

3) That I proposed to unload "hacks and hasbeens" on Metro for the managerial position when I had in fact not mentioned any person.

In addition to this defamatory editorial, you subsequently defamed my character by a cartoon published on August 29, 1962, depicting myself and other Commissioners as small boys attempting to steal a pie from a window sill. This cartoon was published subsequent to receipt by you of my prior letter. The imputation of the cartoon that I attempted to steal from the people of Dade County is clearly libellous per se.

May I respectfully correct another mistake of fact made by you in your letter. You stated that the lengthy interview story published on August 28, 1962, in which my views were printed, was done by you prior to receiving my letter of August 27th. On the contrary, I delivered a copy of the letter to Mr. George Lardner of your paper at the time of the interview at noon on Monday, August 27th; and I delivered the original to your office at 4:00 P.M. that day. The interview was not published until the City Edition of your paper came out early Tuesday, which was more than twelve hours after your paper received a copy of my letter and almost twelve hours after it was delivered to your office.

May I also respectfully point out that the printing of my views in an interview is not the equivalent of a retraction under Florida Statutes, Chapter 770. The public is still left with your personal imputation of bad motives on my part, and is still under the impression that you have "facts" proving that I was part of a conspiracy when, in fact, you know that I was not.

This is especially damaging to a professional man. As Abraham Lincoln said, "A lawyer's time and advice are his stock in trade." A lawyer's advice is valued in proportion to his reputation for integrity, maturity, and ability. The false accusations and imputations of your editorial have unfairly and unjustly damaged my professional standing in this community.

I place a high value on the good will of your newspaper and of your newspaper readers. During my campaign for County Commissioner, I diligently sought your endorsement. I felt honored by the complimentary editorial endorsements which you gave me on Thursday, May 3, 1962, and Tuesday, May 22, 1962. You can imagine my shock and surprise when I found that, without even consulting me to find out exactly what I had done, and why I had done it, you printed an editorial falsifying my actions and imputing base motives to me; and when you later followed this up with a cartoon imputing that I was attempting to steal from the people of Dade County.

I do not insist that you agree with me that a manager should be politically neutral. Neither do I demand that you agree with me that it was unfair and unwise of Mr. McNayr to demand that the Commission take a vote after heated debate during an informal meeting which was called with the understanding that no vote would be

taken. I do not ask you to agree with me that causing the lack of quorum seemed, at the time, to be a good method to allow tempers to cool and to prevent the taking of unwise action in the heat of passion which a full majority of the Commission might not like (especially where a suitable basis for agreement had previously been reached and then been forgotten by all concerned). I do, however, expect that you will not impute base motives to me merely because of my actions have displeased you.

I do not intend to be the type of person who cries "foul" at every criticism offered by a newspaper. Neither do I intend to be the type of person who is constantly fighting newspapers or newspaper editors. I do, however, believe that your editorial of August 26th, and your cartoon of August 29th, went beyond the bounds of fair comment and are contrary to the facts as known by your newspaper. I expect that you, as a fair minded man, will wish to correct these erroneous impressions in your newspaper by publishing a retraction correcting the misstatements of fact and withdrawing the charge of base motives as to myself. I am, therefore, respectfully requesting you to take such action. This request is made pursuant to Florida Statutes, Chapter 770.02

Very truly yours,

Robert M. Brake

RMB:pb

P.S. If, in the future, you have any questions concerning my actions or my motives, I will be most happy to discuss them fully and at length with you personally. I would also welcome an interview with you to explain my actions and views in the above matter.

RMB

EXHIBIT T TO COMPLAINT

Notice of Intent to Sue Dated August 25, 1964

ROBERT M. BRAKE
Attorney at Law
1830 Ponce De Leon Boulevard
Coral Gables, Florida

Eileen Murphy Brake HI 6-2577

August 25, 1964

Mr. Fred Sherman and
The Miami Herald
1 Herald Plaza
Miami, Florida

Sir:

Your editorial of Tuesday, August 25, 1964, entitled "Darrey Davis and Mister Brake" is libellous and demand is hereby made upon you for a retraction under Florida Statutes Chapter 770. Your attention is specifically called to the following:

1. You have impugned my ability as a lawyer and my honesty by saying:

"Bob Brake is a lawyer and he should know the law . . . The Anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?"

Your statement is "more dishonest". Nowhere in the petition is there anything stating—or even implying—that state law will not be enforced. *You knew this* because we gave a copy of the petition to your reporter, Pete Weitzel, on August 4, 1964, when the form was approved by the County Commission. Yet you ignored the truth to libel me.

2. You have impugned my integrity as a public office holder by implying that I did nothing to bring about a fair tax roll during my term of office. You state,

"Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?"

I did not have anything to do with the 1962 roll. Even the Board of Equalization hearings were finished before I took office on July 31, 1962. Many times during my term of office the Commission questioned Mr. McNayr about his progress in preparing a fair and equal tax roll. He always assured us that he was diligently working at this. At the close of the Board of Equalization hearings in 1963, it was apparent to Mr. Hughlan Long and myself that the piecemeal reassessment program of the manager was unfair to the minority who had been reassessed. We objected to that procedure but received no support on the Commission—and none whatsoever from you. Finally, in November, 1963, I voted to have the Hunnicut firm study our tax roll and assessing procedures. Unfortunately the study was not completed until after I left office, but it completely vindicated me in my stand.

You knew this because your reporters attended every commission meeting during my term of office. Yet you ignored the truth to libel me.

3. Your editorial is not even fair comment on my statement of August 20, 1964.

I criticized County Attorney Thomas Britton's memorandum dated August 3, 1964. This memo states that the *cause* of the doubling of the tax roll is the June 28, 1964, order of Judge Smith. It implies that our county officials are not responsible for the doubled roll.

I pointed out that this implication is wrong. The testimony of our county officials gave Judge Smith no choice. *They caused* the doubling of the tax roll because they

". . . testified that just value of property may be accomplished by doubling the present values fixed on the tax roll . . ." (Judge Smith's order of June 29, 1964)

This is directly contrary to the Hunnicut report, which stated in no uncertain terms that

"No equality of assessments could be expected as a result of such a program." (p. 44)

The report further stated that the tax roll had "widely varying differentials in assessments."

Even Mr. Darrey Davis in your article of August 22, 1964, admitted that the tax roll was unequal, when he said

"I think it is accurate to say that the county was making good progress in achieving a proper tax roll. *But it failed to reach this objective . . .*'

Yet our County officials

"testified that the widest variance would be five percent in this County. Whether that be true or not I do not know. He testified from three to five percent." (Judge Smith's ruling, August 10, 1964).

Neither you nor Mr. McNayr nor any of the members of the "first stable commission government Dade has had since Metro was created" have seen fit to discuss these facts. Instead, you have engaged in a program of personal vilification of me.

"Could anything be more dishonest" than your actions? I dont' think so.

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SUPREME COURT, U.S.
FILED
OCT 8 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 449

ROBERT M. BRAKE,

Petitioner

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation and FRED SHERMAN,

Respondents

PETITIONER'S REPLY BRIEF

ROBERT M. BRAKE
Attorney for Petitioner
1830 Ponce de Leon Boulevard
Coral Gables, Florida

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In their brief Respondents have ignored the questions and arguments posed in the Petition and have raised two new issues. Neither of these two new issues is pertinent to the case at bar.

1. *Was the Petition timely filed?*

On pages 20 and 21 of their brief Respondents argue that the Petition was not filed within 90 days from the date of the filing of the opinion of the District Court of Appeal, Third District of Florida. They admit that a timely petition for Writ of Certiorari was filed in the Supreme Court of Florida under Article V Section 4(2) of the Florida Constitution, which permits that Court to issue such writs to review any decision of a District Court of Appeal

> "... that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law..."

The Petition filed in this Court shows that Petitioner asserts that the decision of the District Court of Appeal was in conflict with such Florida cases as *Hevey vs. News Journal Corporation,* 148 So. 2d 543; *Stewart vs. Codrington,* 54 Fla. 327, 45 So. 809; and *Caldwell vs. Personal Finance Co.,* 46 So. 2d 726. Therefore it was necessary for Petitioner to file a Petition for Writ of Certiorari with the Florida Supreme Court in order to exhaust his State remedies, *Stratton vs. Stratton,* 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142 even though the jurisdiction of the Florida Supreme

Court was discretionary, *Andrews vs. Virginian R.Co.*, 248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236, since it is

> "... the existence of the power, and not the considerations moving to its exercise (which is) the criterion by which to determine whether the judgment of the trial court was final..."
> (39 S.Ct. at 102).

In such cases the time for filing a Petition in this Court runs from the date when the Writ of Certiorari was refused by the Florida Supreme Court. *American Railway Express Co. vs. Levee*, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140. Since it is admitted that the Petition was filed only 51 days after the Supreme Court of Florida refused the Writ of Certiorari the present Petition with this Court was timely filed.

See also *Chicago & E.I.R. Co. vs. Industrial Commission of Illinois et al*, 284 U.S. 293, 52 S.Ct. 151, 76 L.Ed. 305; *Adam vs. Saenger et al*, 303 U.S. 61, 58 S.Ct. 456, 82 L.Ed. 651; *Brown vs. Western Ry of Alabama*, 338 U.S. 296, 70 S.Ct. 107, 94 L.E. 102; *Virginian Ry Co. vs. Mullins*, 271 U.S. 220, 46 S.Ct. 526, 70 L.Ed. 915; *Michigan Wisconsin Pipe Line Co. vs. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583.

2. *Did the Court below rule on the Federal question of malice under the First Amendment to the United States Constitution, or did it decide this case solely on the State question of the libelous nature of the language used?*

Respondents devote the remainder of their brief to an assertion that the Court below might have decided this case on the narrow question of whether the language used was libelous. The opinion of the Third District Court of Appeal of Florida, set forth on pages 21 and 22 of the Appendix to the Petition, shows that sole reason given for the decision was the

> "... authority of *New York Times Co. vs. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686. See also *Curtis Publishing Company vs. Butts,* ____U.S.____, 18 L.Ed. 2d 1094, 87 S.Ct.____."

The two cited cases do not deal with the question of whether language is libelous. They treat only the question of the legal standard of malice under the First Amendment. Therefore the ruling of the Court below was solely on the ground that the Complaint, as amended, did not sufficiently allege malice as required by these decisions. To review this question, so that the law can be settled on this point, this Petition has been filed.

Respectfully submitted,

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